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In the Supreme Court of the United States

OCTOBER TERM, 1996

ACORN, *et al.*,

Petitioners,

v.

EDWIN EDWARDS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 22, 1996

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96pp

QUESTION PRESENTED

Whether the Fifth Circuit erred by reversing the district court's award of attorney's fees to Petitioners and holding that 42 U.S.C. § 300j-24(d), which requires states to assist local educational agencies in testing for, and remedying, lead contamination in drinking water at schools, violates the Tenth Amendment.

PARTIES

ACORN, Association of Community Organizations for Reform Now; Illene Sippio, individually and as tutrix of her minor daughters, Terri Sippio and Torey Sippio; and Frank Crosby, individually and as tutor of his minor son, Devin Crosby, were appellees below and are petitioners herein.

Mike Foster (Edwin Edwards at the time suit was originally filed), in his official capacity as Governor of the State of Louisiana; Bobby Jindal (J. Christopher Pilley at the time suit was originally filed), in his official capacity as Secretary of the Louisiana Department of Health and Hospitals; and Lovis Wales (T. Jay Ray, at the time suit was originally filed), in his official capacity as Administrator of the Safe Drinking Water Program, Louisiana Department of Health and Hospitals, Office of Public Health, were appellants below and are respondents herein.

In addition to the above parties, the United States has intervened.

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IN THE

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October Term, 1996

No. 96-

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Petitioners,

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EDWIN EDWARDS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

ACORN respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeal for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeal for the Fifth Circuit, which is reported at 81 F.3d 1387, is reproduced in the appendix hereto at p. A-1, *infra.*

The opinion and order of the United States District

Court for the Eastern District of Louisiana, which are not reported, are reproduced in the appendix hereto at p. A-19, *infra*.

JURISDICTION

The Court of Appeal for the Fifth Circuit entered its judgment on April 22, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pertinent provisions of the Safe Drinking Water Act ("SDWA") are set forth in the appendix hereto at p. A-52, *infra*.

STATEMENT OF THE CASE

This case raises the issue of whether Congress may enlist the assistance of the states in remedying the problem of lead contamination in drinking water at our nation's schools, as prescribed by the Lead Contamination and Control Act of 1988 ("LCCA"). Petitioners, Association of Community Organizations for Reform Now, and two individuals who are members of the Association, (collectively referred to hereafter as "ACORN") originally filed suit to bring Louisiana into compliance with the LCCA. During the pendency of this case before the district court, reasonable improvements were made in the state's LCCA program, and the district court dismissed the entire case as moot. ACORN moved for attorney's fees. That motion was granted by the district court, but then reversed by the Fifth Circuit which held that the LCCA violates the Tenth Amendment.

I. The Problem of Lead Contamination

The number one environmental problem facing America's young children is lead poisoning.[1] The latest available data shows that in 1990 eight million children had levels of lead in their blood high enough to cause significant impairment to their neurological development. Fetuses and children under age six are especially vulnerable to lead's toxic effects because the blood-brain barriers of their neurological systems are still developing, and they absorb more lead in proportion to their weight than do adults.

Children exposed to lead are six times more likely to have a reading disability and seven times more likely not to graduate from high school than their peers. Lead-exposed children exhibit language deficiencies, behavioral problems, lower class ranking and IQ, and impaired fine motor coordination.

A primary source of children's exposure to lead is drinking water. Under normal circumstances, lead levels in ground and surface waters are generally low. However, contamination may occur once the water enters the water distribution system as a consequence of lead service lines or pipes, lead-soldered joints in copper plumbing, lead-containing water fountains and coolers, and lead-containing brass faucets and

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[1] General sources: Centers For Disease Control, *Preventing Lead Poisoning in Young Children* (1991); U.S. Department of Health and Human Services, *Strategic Plan to Eliminate Childhood Lead Poisoning* (1992); Agency for Toxic Substances and Disease Registry, *The Nature and Extent of Lead Poisoning in Children of the United States: A Report to Congress* (1988); House Report No. 100-1041, *reprinted in* 1988 U.S.C.C.A.N. 3793-3807 (and sources cited therein); Environmental Protection Agency, *Lead in School Drinking Water 2-3* (1989).

other fixtures. This problem is compounded in schools, where the "on-again, off-again" water use patterns — long periods of use followed by long periods of non-use — allow lead to leach into the water during the long periods of non-use.

II. The Lead Contamination Control Act of 1988

Recognizing the hazards of lead contamination, Congress passed the Lead Contamination Control Act ("LCCA") in 1988, amending the Safe Drinking Water Act ("SDWA"). 42 U.S.C. §§ 300j-21 through 300j-26. The LCCA creates a federal-state partnership[2] that "provides programs intended to help reduce lead contamination in drinking water, especially for children." H.R. Rep. No. 100-1041 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3793. Specifically, these programs — federal and state — are to help schools evaluate and respond to lead contamination in drinking water. While the scope of the programs encompasses all sources of lead contamination in school drinking water, the programs expressly target water coolers. *See* 55 Fed. Reg. 1772 (1990); 1988 U.S.C.C.A.N. 3793; Environmental Protection Agency, *Lead in School Drinking Water* (1989). Indeed, the LCCA makes the manufacture or sale of lead-containing drinking water coolers a crime. 42 U.S.C. § 300j-23(c).

A. Federal Duties Under The LCCA

The LCCA mandates that the Environmental Protection Agency ("EPA") undertake two non-discretionary duties. First, the EPA is required to publish a list of water coolers

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[2] The entire SDWA is based on a federal-state partnership. Similarly, educational programs and social security programs are based on a federal-state partnership.

which are not lead free.

> [A]fter notice and opportunity for public comment . . . [and using] the best information available [,] . . . [EPA] shall publish a list of each brand and model of drinking water cooler . . . which is not lead free, including each brand and model of drinking water cooler which has a lead-lined tank.

42 U.S.C. § 300j-23(a). As defined in the LCCA, the term "lead free" means:

> with respect to a drinking water cooler, that each part or component of the cooler which may come in contact with drinking water contains not more than 8 percent lead, except that no drinking water cooler which contains any solder, flux, or storage tank interior surface which may come in contact with drinking water shall be considered lead free if the solder, flux, or storage tank interior surface contains more than 0.2 percent lead.

42 U.S.C. § 300j-21(2). The EPA fulfilled its duty under 42 U.S.C. § 300j-23(a) by publishing a final list of coolers in the January 18, 1990, Federal Register. 55 Fed. Reg. 1772 (1990).

Second, the LCCA mandates that the EPA "publish a guidance document and a testing protocol to assist schools in determining the source and degree of lead contamination in school drinking water supplies and in remedying such contamination." 42 U.S.C. § 300j-24(b). The EPA fulfilled this duty in January, 1989, by publishing a booklet entitled

Lead in School Drinking Water. See 54 Fed. Reg. 14316 (1989).

The LCCA also mandates that the Consumer Product Safety Commission ("CPSC") issue an order requiring the manufacturers of drinking water coolers with lead-lined tanks (as identified by EPA) to "repair, replace, or recall and provide a refund for such coolers . . . ." 42 U.S.C. § 300j-22. The CPSC fulfilled this duty on June 1, 1990. *See* 55 Fed. Reg. 22387 (1990).

B. State Duties Under The LCCA

The state's responsibilities under the LCCA stem from only two provisions: 42 U.S.C. §§ 300j-24(c) and 300j-24(d).

First, pursuant to 42 U.S.C. § 300j-24(c), states are to disseminate the EPA guidance document, testing protocol, and list of water coolers which are not lead free.

> [States shall] provide for the dissemination to local educational agencies, private nonprofit elementry or secondary schools and to day care centers of [EPA's] guidance document and testing protocol published under [section 300j-24(b)], together with the list of drinking water coolers published under section 300j-23(a) of this title.

42 U.S.C. § 300j-24(c).

Second, pursuant to 42 U.S.C. § 300j-24(d), states are to set up some sort of program to assist local educational agencies in remedying lead contamination problems.

> Within 9 months after October 31, 1988, each State shall establish a program . . . to assist local educational agencies in testing for and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

42 U.S.C. § 300j-24(d)(1). In the case of drinking water coolers, such programs should ensure that coolers that are not lead free will be timely removed from schools.

> [S]uch program[s] shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure that within 15 months after October 31, 1988 [by January 31, 1990], all such water coolers in schools under the jurisdiction of [local educational] agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found . . . not to contribute lead to drinking water.

42 U.S.C. § 300j-24(d)(3).

Thus, subsection 24(c) merely requires states to dissseminate the EPA material, and subsection 24(d) merely requires states to establish a program to assist local educational agencies with remedying lead contamination in school drinking water. Such programs must ensure timely removal of contaminated water coolers. Participation by schools in the state program is voluntary.

ACORN filed suit against the state of Louisiana because the State did not timely distribute the correct EPA list of contaminated water coolers, and did not set up a program that ensured timely removal of such water coolers.

C. Louisiana's LCCA Program

The Louisiana LCCA Program is administered by the Office of Public Health ("OPH") (which is within the Department of Health and Hospitals) and relies on the voluntary participation of the schools. Sidney G. Becnel, *Louisiana's Implementation of the Federal Lead Contamination Control Act of 1988* (1989).

Pursuant to the program that Louisiana devised, schools are asked to complete and return to OPH a "Lead in Drinking Water" questionnaire if they desire to participate. On the questionnaire, the school describes each type of water outlet at the school (e.g., water cooler, faucet), its physical location within the school, and its manufacturer, model number, and serial number. OPH "enters" the information from the questionnaires into the State's LCCA computer database. Thereafter, sample bottles are sent to the schools so that the water from *all* outlets — not just water coolers — at the schools may be tested.[3]

Although, after reviewing the schools' questionnaires, OPH has serial and model numbers of water coolers located within the schools, and thus could notify the schools of the

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[3] This litigation only pertains to contaminated water coolers, and does not in any way include issues pertaining to sampling of other water outlets at schools, which states may or may not elect to undertake. The undertaking of such sampling by states is not a requirement of the LCCA.

presence of any water coolers that are "not lead free" – thereby quickly and easily satisfying their obligation to have a program that ensures timely removal of such coolers – OPH does not do so. Instead, OPH waits until sample bottles from all outlets are returned from schools before notifying schools of *any* contamination problems. But OPH's significant delay in getting sample bottles to participating schools meant that tainted water coolers identified on questionnaires unnecessarily remained in schools for long periods of time.

For example, as of September 1993, over half of Louisiana's schools and day care centers (2,001 schools) had chosen to participate in Louisiana's LCCA program by sending in a completed questionnaire describing the types of drinking water sources at their facilities. *See* OPH September 1993 LCCA Implementation Report.[4] However, the Respondents' own documents show that as of that same date – more than 4 years after Louisiana's LCCA Program was implemented, and more than 3 1/2 years after the statutory deadline for removing tainted water coolers – water outlets in only 56% of the participating schools had been tested. *See* OPH September 1993 LCCA Implementation Report.

As the above numbers indicate, electing to wait until all sample bottles for all outlets were turned in, rather than sending a simple notice to schools when questionnaires were received indicating the presence of tainted coolers, meant that the State's LCCA program did not ensure the timely removal of such coolers. Respondents' rate of testing was, at best,

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[4] During the pendency of this matter before the district court, Defendants stopped preparing implementation reports after September 1993.

lethargic before ACORN took action. For example, from April 1992 to June 1993 the percentage of participating schools *tested* increased by just 12.5%, while the *number* of participating schools was constant (0% increase). *See* OPH April 1992 LCCA Implementation Report (32.5% of 2,046 participating schools tested); OPH June 1993 LCCA Implementation Report (45% of 2,020 participating schools tested). Assuming this rate of testing continued, testing of currently participating schools would not be completed until around June of 1998 — over 8 years beyond the deadline mandated by the LCCA for removal of contaminated coolers.

As a direct result of ACORN's litigation efforts, the rate of testing increased substantially — from 52 samples per week being tested in 1992 to 453 samples per week being tested in the first two months of 1994[5] — and the State finally distributed the correct EPA list of contaminated water coolers. But notwithstanding this significant increase in the amount of participating schools tested after this suit was filed, at least 598 participating schools still had not had their drinking water coolers tested as of January 1, 1994.[6] Clearly, then, _____

[5] *See* OPH April 1992 LCCA Implementation Report (32.5% of participating schools tested); OPH September 1992 LCCA Implementation Report (34.1% of participating schools tested); OPH June 1993 LCCA Implementation Report (45% of participating schools tested); OPH September 1993 LCCA Implementation Report (56% of participating schools tested).

The number of school drinking water samples that were tested by OPH jumped from 52 samples/week (last six months of 1992) to 103 samples/week (first six months of 1993) to 195 samples/week (last six months of 1993) to 453 samples/week (first two months of 1994).

[6] During document production on January 7, 1994, Les Lemon of OPH generated a list from the LCCA computer database that identified 598 participating schools and day care centers where drinking water coolers were untested.

Louisiana had failed to adopt measures to:

> ensure that [by January 31, 1990] all . . . water coolers which are not lead free and which are located in schools . . . are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found . . . not to contribute lead to drinking water.

42 U.S.C. § 300j-24(d)(3).

III. Procedural Background

On February 17, 1993, ACORN sent the State a "Notice of Intent to Sue" letter, as required by 42 U.S.C. § 300j-8. Less than two months after the receipt of this letter, the State disseminated an EPA "fact sheet" dated February 1990, which identified certain water coolers which are not lead free.

On May 4, 1993, ACORN filed a complaint against the State for failing to design an appropriate program to ensure timely removal of contaminated water coolers, as required by 42 U.S.C. § 300j-24(d). ACORN later amended its complaint to encompass a violation of 42 U.S.C. § 300j-24(c) as well, asserting that the State should have disseminated the January 1990 list of contaminated water coolers published in the Federal Register, not the February 1990 EPA fact sheet.

The State then moved for dismissal for lack of subject matter jurisdiction or for summary judgment in the alternative. The State argued that ACORN did not have standing and that ACORN did not give the notice required under 42 U.S.C. § 300j-8(b)(1). The district court denied the motion.

A motion by the State for reconsideration was also denied. The State then filed a motion to certify constitutional questions to the Attorney General of the United States. The district court denied the motion.

On May 16, 1994, the State filed yet another summary judgment motion (which was untimely pursuant to the district court's minute entry setting various deadlines for the case). Having decided at this point that Louisiana had been spurred by the lawsuit into taking reasonable action, ACORN sent a motion to the State for voluntary dismissal on May 31, 1994. The State refused to sign. Later, however, after a conference call in which ACORN expressed "no objection to the dismissal of its suit as moot," the district court granted the State's summary judgment motion, dismissing all claims as moot, but expressly reserving the parties' rights to litigate the issue of attorney's fees.

ACORN then filed a motion for attorney's fees and expenses pursuant to 42 U.S.C. § 300j-8(d). The district court granted the motion and awarded ACORN $41,181.25. (Appendix, A-20; 1994 WL 634983 at 1). Specifically, the district court found that the goals of ACORN's lawsuit were achieved and that the lawsuit was a "significant catalyst or a substantial factor behind the altered government action." (Appendix, A-23 - 24; 1994 WL 634983 at 3).

The State appealed to the United States Court of Appeal for the Fifth Circuit, where, at oral argument, the panel inquired as to the constitutionality of the LCCA and ordered supplemental briefing on that issue. (Appendix, A-12; 81 F.3d at 1391). The Fifth Circuit certified to the Attorney General that the constitutionality of an Act of Congress was

drawn into question, and on October 5, 1995, the United States' motion to intervene was granted. *Id.*

After wading through the "morass" of the State's numerous alleged errors, (Appendix, A-8; 81 F.3d at 1390) the Fifth Circuit reversed the district court's award of attorney's fees to ACORN. The Fifth Circuit reasoned that under 42 U.S.C. § 300j-8(a),(d) a district court may only award attorney's fees in suits brought for violations of lawful requirements of the SDWA, and that no violations of lawful requirements under the LCCA had occurred.

First, with respect to 42 U.S.C. § 300j-24(c) (requiring dissemination of the list of contaminated coolers), the Fifth Circuit ruled that there was no violation of this provision by concluding that the verb "publish" in 42 U.S.C. §§ 300j-23(a) and 24(c) does not require publication of the list of contaminated coolers *in the Federal Regieter.* (Appendix, A-8 - 11; 81 F.3d at 1391-92). As a result, the State's dissemination of the EPA fact sheet listing contaminated coolers, rather than the Federal Register list, was deemed satisfaction of the requirements of 42 U.S.C. § 300j-24(c).[7] Thus, the Fifth Circuit did not reach the question of the constitutionality of this provision. ACORN asserts both that

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[7] As set forth at 23, n. 14 herein, *infra*, the court of appeal erred in making this finding. The clear language of the LCCA requires distribution of the water cooler list published in the Federal Register. *See* 42 U.S.C. §§ 300j-23(a) and 300j-24(c). Furthermore, the fact sheet that the State distributed contained erroneous information and, unlike the Federal Register list, did not include the model numbers most familiar to consumers, and did not include other additional information and an advisory — with a toll free number — regarding Halsey Taylor water coolers that have lead-lined tanks.

the state of Louisiana did violate this provision,[8] and that this provision is constitutional.[9]

Second, with respect to 42 U.S.C. § 300j-24(d) (requiring a program to ensure timely removal of contaminated water coolers), the Fifth Circuit found that the provision falls "squarely within the ambit of *New York,*"[10] and declared the provision unconstitutional. (Appendix, A-16 - 17; 81 F.3d at 1394-95). ACORN assserts that this provision of the LCCA does not fall squarely within the holding of New York, and thus is constitutional.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Holding That 42 U.S.C. § 300j-24(d) Of The LCCA Violates The Tenth Amendment Erroneously Extends and Conflicts with Tenth Amendment Jurisprudence

By declaring 42 U.S.C. § 300j-24(d) of the LCCA

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[8] The district court shared ACORN's opinion that the LCCA requires states to distribute the Federal Register list of coolers, not the EPA fact sheet. "On February 21, 1994 the defendants [finally] discharged their duties under 42 U.S.C. § 300j-24(c) and sent the required Federal Register list, thereby fulfilling one of the two goals sought by plaintiffs." (Appendix, A-24; 1994 Westlaw 634983 at 3).

[9] Tenth Amendment jurisprudence, discussed at pages 15 - 21 herein, *infra*, precludes a finding that simply imposing responsibility on states to distribute a federally generated document constitutes an invasion of the province of state sovereignty protected by the Tenth Amendment. As noted in *FERC v. Mississippi*, 456 U.S. 742, 762 (1982), the Supreme Court has upheld a variety of federal laws that impose requirements on states to engage in reasonable administrative action. Further, in an even more recent case, the Court held that no Tenth Amendment problem exists even where a state must devote "substantial effort[s]" to implementing the federal requirement. *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988). In short, unless a federal statute enlists the aid of state employees in a clearly burdensome fashion, there is no Tenth Amendment problem.

[10] *New York v. United States*, 505 U.S. 144 (1992).

unconstitutional, the Fifth Circuit has erroneously broadened the scope of *New York v. United States*, 505 U.S. 144 (1992), and has failed to reconcile its decision with other Supreme Court decisions pertaining to the Tenth Amendment.

Hyperbolically categorizing section 300j-24(d) of the LCCA as "Congressional conscription of state legislative functions," the Fifth Circuit held that section 300j-24(d) is "clearly prohibited under *New York's* interpretation of the limits imposed upon Congress by the Tenth Amendment." (Appendix, A-16; 81 F3d at 1394.) However, section 300j-24(d) in no way amounts to the kind of excessive burden on a state which Supreme Court caselaw has found violative of the Tenth Amendment.

A. Tenth Amendment Caselaw In General

The Supreme Court has long recognized that the Tenth Amendment is not violated every time the federal government requires state assistance in implementing federal law. In *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court observed that "[w]hile this Court never has sanctioned explicitly a federal command to the States to *promulgate* and *enforce laws* and *regulations*, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC*, 456 U.S. at 761-62 (emphasis added) (citing *EPA v. Brown*, 431 U.S. 99 (1977); *Fry v. United States*, 421 U.S. 542 (1975); *Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658 (1979); *Testa v. Katt*, 330 U.S. 386 (1947)).

The *FERC* Court upheld a directive to states that was far more intrusive and non-discretionary than the LCCA's direction to disseminate EPA materials and to ensure that contaminated water coolers are timely removed from schools. *FERC* involved, *inter alia,* a statutory requirement[11] that compelled states to "implement" FERC rules designed to encourage power production at small plants. 456 U.S. at 759. Several years after the *FERC* decision, the Court noted that no Tenth Amendment problem exists even where a state must devote "substantial effort[s]" to implementing the federal requirement. *South Carolina v. Baker,* 485 U.S. 505, 514-15 (1988).

B. The New York Decision In Particular

Nothing in the *New York* decision alters the basic understanding that Congress may require assistance from states in implementing federal law. In *New York,* the Supreme Court faced a challenge by the state of New York and two of its counties to three provisions of the Low-Level Radioactive Waste Policy Act. All three provisions imposed significant burdens on the State, but only one provision was found unconstitutional under the Tenth Amendment.

The offending provision required a state to either provide for the disposal of all low-level radioactive waste generated within the State by 1996 or take title to the waste at that time. The first of these alternatives, the Court

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[11] Section 210 of the Public Regulatory Policies Act.

emphasized, was a "command [to] state government to *enact state regulation.*" *New York,* 505 U.S. at 178 (emphasis added) (citations omitted). The directive thus clashed with the constitutional rule that Congress itself must "legislate" in furtherance of a federal interest and thus may not "conscript" states to legislate for it. *Id.* The second alternative — that the states actually take title to the radioactive waste — was fatally flawed for the same reason. *Id.* at 176. Accordingly, the Court's explicit holding in *New York* was that both statutory alternatives were unconstitutional because either way, the Act " 'commandeers' the states' *legislative* processes 'by directly compelling them to *enact and enforce* a federal regulatory program.' " *Id.* at 176 (emphasis added; (citation omitted).

Throughout *New York* the Court emphasized the constitutional problems that arise when Congress declines to enact a federal legislative solution and instead commands that states "enact and enforce" their own schemes. This kind of buck-passing, the Court explained, violates the Framer's constitutional design because it allows federal officials to avoid responsibility for politically controversial decisions.

"Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation." 505 U.S. at 168. Thus, *New York* holds that the federal government may not diminish accountability in this way by "commandeering" the state's political processes.

Again and again, the authority cited by the *New York* Court speaks in terms of lawmaking or regulations: "[The

Hodel Court] upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did not "commandeer" the states into *regulating* mining." *New York, Id.* at 161 (emphasis added). "[In *FERC v. Mississippi*] the Court observed that 'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce *laws* and *regulations*.' " *Id.* at 161 (emphasis added) (quoting *FERC*, 456 U.S. 742, 761-62 (1982). "As in *Hodel*, the [*FERC*] Court upheld the statute at issue . . . [because there was nothing in it] 'directly compelling' the States to enact a *legislative* program." *New York*, 505 U.S. at 162 (emphasis added) (quoting *FERC*, 456 U.S. at 765).

But in stark contrast to the situation involved in the *New York* decision, in dealing with lead contaminated water coolers, the federal government has not declined to enact a federal legislative solution, and has not commandeered states' political processes to require states to "enact and enforce" a solution. The federal government *has* devised appropriate legislation to deal with such coolers, and that legislation requires very minimal assistance from states. Further, under the LCCA, federal officials have not sought to avoid responsibility for any politically controversial decisions, such as a decision about how to dispose of low-level radioactive waste, as was the situation in *New York*.

There can be no question that the law invalidated in *New York* was a "command [to] state government to enact *state* regulation" to deal with the problems of radioactive waste disposal.[12] *New York*, 505 U.S. at 178. The statute

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[12] The "take title" provision involved in *New York* compelled states to regulate in the field of radioactive waste, whereas 42 U.S.C. § 300j-24(d) does not require that states either "regulate" or "legislate" with regard

in the *New York* case controversial policy choices on to the states and thus violated fundamental principles of political accountability. *See Mack v. United States,* 66 F.3d 1025, 1030 (9th Cir. 1995). The provisions of the LCCA that impose minimal responsibility on the states suffer none of these defects. The LCCA itself presents a Congressional solution to the problems posed by lead contaminated water coolers. It requires EPA to prepare a guidance document and testing protocol aimed at helping local educational agencies determine the source and degree of lead contamination in their drinking water. It also requires EPA to prepare a list of water coolers that have lead tanks or are otherwise not lead-free. 42 U.S.C. § 300j-23. It provides that coolers on the list that have lead-lined tanks are to be considered "imminently hazardous" under section 12 of the Consumer Product Safety Act, and requires the Consumer Product Safety Commission to order the repair, replacement, or recall and refund for such coolers. 42 U.S.C. § 300j-22.

For their part, the states are only required to disseminate the EPA materials, and have some mechanism for ensuring that contaminated coolers are timely removed. The states are not required to decide which water coolers are suspect or pass legislation to regulate water coolers and/or their manufacturers; the federal government does that. And the LCCA does not impose anything like the offending burdens in *New York*; for example, in no instance does the LCCA force a state to "take title" to water coolers that are not lead free, or to be liable for damages such as those suffered by the many children otherwise exposed to lead con-

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footnote 12 continued

to lead contamination. *Compare* 42 U.S.C. §§ 2021b-2021j, *with* 42 U.S.C. § 300j-24.

taminated water. And finally, pursuant to the LCCA, states "are not even being asked to produce a state policy, for which the state must bear political accountability." *Mack*, 66 F.3d at 1031. Thus, the central sovereign powers of states — legislation and regulation — simply have not been commandeered by the LCCA's requirement that states offer limited assistance in dealing with the problem of contaminated coolers in schools.

In short, the Court's analysis in *New York* does not establish an absolute bar against any federal requirement that state officials implement national policy. Significantly, the Court neither disavowed its prior recognition that the federal government may "direct state decisionmakers to take or to refrain from taking certain actions" (*FERC*, 456 U.S. at 762), nor overruled previous decisions recognizing that various mandates to state officials pass constitutional muster.

If the *New York* Court had intended to erect an absolute bar to federal mandates that states take action, its searching analysis of the problems presented by the statute at issue would have been superfluous. After announcing such a new rule in *New York*, the Court would have overruled its prior, directly conflicting decisions, and then disposed of the case in short shrift. The Court did neither of those things.

New York simply stands for the proposition that the "etiquette of federalism [is] violated where there is a 'formal command from the National Government directing a State to enact a certain policy.' " *United States v. Lopez*, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring, joined by O'Connor, J.). As the Ninth Circuit recently concluded, *"New York* . . . is best read as a case that draws a line already

partly delineated in [other cases such as *FERC*]: the federal government is not entitled to coerce states into legislating or regulating according to the dictates of the federal government." *Mack*, 66 F.3d at 1030. However, *New York* casts no shadow on the well-established principle that the state may be called upon to assist in the implementation of federal law.

II. Because The Fifth Circuit's Holding Annuls An Act Of Congress, Certiorari Should Be Granted

Declaring an Act of Congress unconstitutional is a "grave" matter. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985); *United States v. Gainey*, 380 U.S. 63, 65 (1965). Such an annulment of a statute is to be avoided wherever possible. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). It is the serious nature of such an annulment that has caused this Court to grant certiorari in the past.[13] *See Gainey*, 380 U.S. at 65 (certiorari granted "to

[13] Until the repeal of 28 U.S.C. § 1252 in 1988, a petitioner was *guaranteed* an appeal to the Supreme Court from any federal court, including the district courts, if the lower court declared a federal statute unconstitutional and the United States or a federal agency was a party in the action. However, pursuant to the Supreme Court Case Selections Act, Pub. L.No. 100-352, § 1, 102 Stat. 662 (1988), virtually all of this Court's mandatory jurisdiction was eliminated, including jurisdiction under 28 U.S.C. § 1252 to hear cases wherein a federal statute was declared unconstitutional. Nevertheless, the underlying presumption of 28 U.S.C. § 1252 — namely, that declaring a federal statute unconstitutional is an issue of grave importance — remains valid.

review the exercise of the grave power of annulling an Act of Congress"); *Heckler v. Edwards*, 465 U.S. 870, 882 ("declarations of unconstitutionality have ramifications beyond the interests of litigants in the particular case").

The importance of the particular Act of Congress at issue in this litigation, the LCCA, further warrants the granting of certiorari. As previously discussed, lead poisoning is the number one environmental problem facing America's young children. It causes brain damage. Children under age six are especially vulnerable to lead's toxic effects because their neurological system is still developing, and they absorb more lead in proportion to their weight than do adults. Accordingly, the LCCA includes day care centers as well as schools in its coverage, in order to reach the most vulnerable — the very youngest children.

The LCCA is a key part of the effort to protect our children from lead poisoning. As a result of the LCCA, cooperative programs have been established between the federal government and the states to reduce the risk of lead contamination from drinking water coolers and other sources at schools. Without these programs, eliminating lead contamination in schools and day care centers may very well grind to a halt — as Louisiana's sluggish efforts before this suit was filed have amply demonstrated. Nothing less than the health of this nation's children is at stake.

In short, given the grave nature of the Fifth Circuit's holding, this Court should grant certiorari.

III. The Fifth Cicuit's Holding Is Clearly Erroneous And Presents Important Issues Meriting Review

By declaring 42 U.S.C. § 300j-24(d) of the LCCA un-

constitutional, the Fifth Circuit reached an erroneous decision in this case. That is, the Fifth Circuit decided to reverse the district court's award of attorney's fees and expenses to ACORN, when in fact the award should have been sustained. The Fifth Circuit reasoned: "[B]ecause ACORN has failed to establish that Defendants were in violation of any lawful requirement of the LCCA at the time it commenced this suit, the district court's award of attorney's fees to ACORN under § 300j-8(d) was improper." (Appendix, A-18; 81 F.3d at 1395). However, pursuant to the relevant jurisprudence cited herein, 42 U.S.C. § 300j-24(d) does not violate the Tenth Amendment, contrary to the opinion of the Fifth Circuit. Thus, the State was in fact violating a "lawful requirement" at the time this suit was commenced, and the district court's award of attorney's fees and expenses should have been affirmed.[14]

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[14] It should be noted that, alternatively, the court of appeals also erred by rejecting ACORN's argument that under §§ 300j-23(a) and 24(c) it was insufficient for the State to publish the EPA fact sheet, rather than the EPA "final list." *See* A-7 *supra*. 42 U.S.C. § 300j-24(c) requires the State to "publish for the dissemination [to schools] . . . the list of drinking water coolers *published under section 300j-23(a)* of this title." (emphasis added)

Section 300j-23(a) requires that EPA "after notice and opportunity for public comment" and "us[ing] the best information available . . . shall publish a list of each brand and model of drinking cooler [which is not lead free] . . . [and] shall separately identify each brand and model of cooler which has a lead-lined tank."

When the EPA published the final list of coolers in the January 18, 1990 Federal Register, it expressly acknowledged that it was discharging its duties under section 300j-23(a). Specifically, in that Federal Register, EPA stated that "[the] final list of water coolers with lead-lined tanks" was "issued pursuant to the Lead Contamination Control Act of 1988 . . . section 1463 [codified at 42 U.S.C. § 300j-23(a)]." 55 Fed. Reg. 1772 (1990).

Therefore, by the clear language of 42 U.S.C. §§ 300j-24(c) and 300j-24(a), and 55 Fed. Reg. 1772 (1990), the State had a duty imposed

After what the district court described as a "long, arduous legal battle" which ACORN was forced to bring because the State's efforts to address lead contaminated coolers were "less than vigilant,"[15] this Court should grant certiorari in order to correct the Fifth Circuit's error.

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footnote 14 continued

by law to disseminate the list of coolers published on January 18, 1990 in the Federal Register. By not recognizing this duty, the court of appeals erred in failing to find that the State violated this provision and that ACORN is entitled to attorney's fees incurred in pursuing its § 300j-24(c) claim.

[15] Appendix, A-19; 1994 WL 634983, at 1.

CONCLUSION

The Fifth Circuit's holding that 42 U.S.C. § 300j-24(d) of the LCCA violates the Tenth Amendment erroneously extends and conflicts with Tenth Amendment jurisprudence. This erroneous annulment of an important Act of Congress, which was designed to protect the children of this country from lead poisoning, must be reversed. Accordingly, Petitioners submit that this Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED APRIL 22, 1996

ACORN, Association of Community Organizations for Reform Now; Illene Sippio, Individually and as tutrix of her minor daughters, Terri Sippio and Torey Sippio; Frank Crosby, Individually and as tutor of his minor son, Devin Crosby, Plaintiffs-Appellees,

v.

Edwin EDWARDS, In his official capacity as Governor of Louisiana; J. Christopher Pilley, In his official capacity as Secretary of the Louisiana Department of Health and Hospitals; T. Jay Ray, In his official capacity as Administrator of the Safe Drinking Water Program, Louisiana Department of Health and Hospitals, Office of Public Health, Defendants-Appellants.

No. 94-30714.

United States Court of Appeals,

Fifth Circuit.

April 22, 1996.

Before GARWOOD, DUHE' and PARKER, Circuit Judges.

DUHE', Circuit Judge:

A public interest group and two concerned parents sued Louisiana state executive officials, in their capacities, to force the State into compliance with the Lead Contamination Control Act of 1988, Pub.L. No. 100-572, 102 Stat. 2884 (codified

in relevant part at 42 U.S.C. §§ 300j-21 to 300j-26). After the suit was dismissed as moot, the Plaintiffs successfully moved for attorney's fees. The Defendant state officials appealed the award. Because we agree that the Plaintiffs failed to allege a violation of the lawful requirement of the Act, and thus no basis for an award of attorney's fees exists, we reverse and render judgment dismissing the claim for attorney's fees.

I. The Lead Contamination Control Act of 1988

In response to concerns that the nation's children were being exposed to unsafe levels of lead in their drinking water, Congress passed the Lead Contamination Control Act of 1988 ("LCCA"). H.R.Rep. No. 1041, 100th Cong., 2d Sess. at 6-8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3793, 3793-95. The LCCA amended the Safe Drinking Water Act ("SDWA") to target what Congress perceived was a significant source of such lead contamination—electric drinking water coolers containing lead solder or lead-lined water tanks located in schools. *Id.* at 7, *reprinted in* 1988 U.S.C.C.A.N. at 3794-95. Under the LCCA, the Administrator of the Environmental Protection Agency and the States share responsibility for remedying this problem.

The Administrator is required to identify each brand and model of drinking water cooler which is not lead free, including each brand and model that has a lead-lined tank. 42 U.S.C. § 300j-23(a). A list of the identified drinking water coolers must then be published, subject to the Administrator's continuing duty to update the list as new information becomes available.[1] *Id.* The Administrator is also required

[1] All drinking water coolers identified on this list as having a lead-lined tank are considered to be imminently hazardous under the Consumer Product Safety Act, 15 U.S.C. § 2051 et. seq., and the manufacturer and importer of such coolers is required to repair, replace, or recall and provide

to distribute to the States the list of non-lead free drinking water coolers, as well as to publish a guidance document and testing protocol aimed at helping local educational agencies, schools, and day care centers determine the source and degree of lead contamination in their drinking water systems and remedy such contamination. 42 U.S.C. § 300j-24(a)-(b).

The States' responsibilities under the LCCA stem from only two provisions. Section 300j-24(c) provides that "[e]ach State shall provide for the dissemination to local educational agencies, private nonprofit elementary or secondary schools and to day care centers of the guidance document and testing protocal published [by the Administrator], together with the list of drinking water coolers published under section 300j-23(a) of this title." 42 U.S.C. § 300j-24(c). Further, § 300j-24(d) requires States to establish remedial action programs for the removal of lead contaminants from school drinking water systems. More particularly, this section states:

> (d) Remedial action program
>
> (1) Testing and removing lead contamination
>
> Within 9 months after October 31, 1988, each State shall establish a program, consistant with this section, to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.
>
> * * * * * *

(footnote 1 continued)

a refund for the coolers by a date specified in the LCCA. 42 U.S.C. § 300j-22. Additionally, the LCCA provides criminal and civil penalties for any person who sells in interstate commerce, or manufactures for sale in interstate commerce, any drinking water cooler listed, or any other drinking water cooler that is not lead free. 42 U.S.C. § 300j-23(b)-(d).

(3) Coolers

In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are lacated in schools. Such measures shall be adequate to ensure that within 15 months after October 31, 1988, all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found (within the limits of testing accuracy) not to contribute lead to drinking water.

Section 300j-25 provides that the Administrator shall make grants to the States to assist them in complying with these mandates.[2]

Finally, § 300j-8 of the SDWA provides a mechanism by which "any person may commence a civil action on his own behalf" to force the Administrator and the States to carry out the mandates of the LCCA.

II. Procedural Background

Pursuant to the citizen's suit provision of the SDWA (42 U.S.C. § 300j-8), the Association of Community Organiza-

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[2] Section 300j-25(a) mandates that the Administrator "shall make grants to States to establish and carry out State programs under section 300j-24." Section 300j-25(c) authorizes Congress to appropriate $30,000,000 for each fiscal year from 1989 to 1991 to fund the Administrator's efforts. No such appropriations, however, have been made by Congress, and the Administrator has not awarded any grants to the States pursuant to its authorization.

tions for Reform Now ("ACORN")[3] sent a "Notice of Intent to File Suit" letter to Louisiana's Governor; its Secretary of the Department of Health and Hospitals; and the Administrator of the Safe Drinking Water Program of the Louisiana Department of Health and Hospitals. Therein, ACORN alleged violations of § 300j-24(c) (failure to disseminate the EPA list of non-lead free drinking water coolers) and § 300j-24(d)[4] (failure to establish a remedial action program). After receiving this letter, the Department of Health and Hospitals distributed to local educational agencies, schools, and day care centers an EPA Fact Sheet that listed non-lead free drinking water coolers identified as of February 1990.

Thereafter, ACORN[5] sued these officials in their official capacities (hereinafter "Defendants"), alleging only that Defendants had failed to establish a remedial action program

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[3] The letter was sent by the Sierra Club Legal Defense Fund, Inc., on behalf of ACORN and "the children of Frank and Sheryl Crosby, the children of Illene D. Sippio, and a class of all other similarly situated children in Louisiana."

[4] ACORN's letter, in fact, alleged violation of subsections (d)(1) and (d)(3) only. Accordingly, to simplify our task, we will refer to these two subsections collectively as § 300j-24(d). Subsection(d)(2), which is not at issue and thus is excluded from our discussion and conclusions, provides:

> A copy of the results of any testing under paragraph (1) shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such testing results.

[5] Suit was actually filed on behalf of ACORN, Illene Sippio, individually and as the natural tutrix of her minor daughters, and Frank Crosby, individually and as the natural tutor of his minor son. Sippio and Crosby are parents of children attending schools that did not receive the EPA list timely and that employ drinking water coolers contained on the list. For simplicity, these plaintiffs will be referred to throughout the opinion collectively as "ACORN."

as required by § 300j-24(d), and seeking declaratory and injunctive relief. After concluding that distribution of the EPA Fact Sheet instead of the final list of non-lead free drinking water coolers published by the EPA in the January 18, 1990 Federal Register did not satisfy § 300j-24(c), ACORN amended its complaint to add a cause of action for violation of this provision of the LCCA.

Defendants moved for dismissal for lack of subject matter jurisdiction or, alternatively, summary judgment. Defendants claimed that ACORN did not give the notice required under § 300j-8(b)(1) and that ACORN, the organization, lacked standing. The district court denied Defendants' motion.[6] *ACORN v. Edwards,* 842 F.Supp. 227 (E.D.La.1993). Thereafter, Defendants answered ACORN's complaint reasserting inadequate notice and lack of subject matter jurisdiction, and alleging that ACORN's claims were barred by the Eleventh Amendment, that ACORN failed to join certain indispensable parties—i.e., the EPA and local educational agencies, and that the provisions of the LCCA at issue are unconstitutional. Defendants filed a Motion to Certify Constitutional Questions to the Attorney General of the United States.

ACORN moved for summary judgment on the issue that Defendants were in violation of § 300j-24(d)(3). Defendants then filed their own summary judgment motion seeking dismissal of all claims, or alternatively the claims of the individual plaintiffs and the § 300j-24(c) claim. The district court denied ACORN's summary judgment motion and Defendants' motion to certify the constitutional questions.

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[6] The district court also denied Defendants' motion seeking reconsideration. *ACORN,* 842 F.Supp. at 235.

Later, however, the district court, after a telephone status conference with all parties, granted Defendants' motion for summary judgment and dismissed all claims as moot.[7] The district court's ruling specifically reserved the parties' rights to litigate whether attorney's fees may be due.

ACORN then moved for an award of attorney's fees and other expenses pursuant to § 300j-8(d).[8] Defendants opposed this motion on numerous grounds; most notably that the provisions of the LCCA sought to be enforced are unconstitutional. The district court reaffirmed that all claims in this suit were dismissed as moot and ordered Defendants to pay attorney's fees and expenses of $41,181.25 to ACORN for payment by it in the same amount to its attorneys. Defendants timely appealed.

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[7] The record indicates that ACORN submitted to Defendants a motion to dismiss under Federal Rule of Civil Procedure 41(a)(2) believing that the State was now complying with the LCCA. Defendants declined to consent to the dismissal. After the telephone status conference, during which ACORN expressed a desire to redirect its resources from litigation to monitoring the LCCA program, Defendants filed the summary judgment motion that was granted.

The district court, in its Memorandum Opinion and Order of November 14, 1994, recognized that ACORN's claims were mooted by the State's compliance with §§ 300j-24(c) and (d). On February 21, 1994, the State distributed the January 1990 Federal Register list. Further, during the pendency of this litigation, the State completed inspection of all of the suspect drinking water coolers located in participating schools in accordance with the State's remedial action plan--i.e., *Louisiana's Implementation of the federal Lead Contamination Countrol Act of 1988*. The cover page of this plan indicates it was produced by the State's LCCA Program Director in 1989.

[8] Section 300j-8(d) provides that "[t]he court, in issuing any final order in any action brought under [300j-8](a), may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate."

III. Discussion

On appeal, Defendants raise numerous alleged errors attacking the district court's award of attorney's fees. After wading through this morass, we elect to resolve Defendants' claims as follows.

A. *42 U.S.C. § 300j-24(c)*

[1] Defendants challenge both § 300j-24(c) and § 300j-24(d) as violative of the United States Constitution—in particular, the Tenth Amendment. We are mindful, however, that "[federal courts] have [a] ... duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster County v. Allen,* 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). *See also Ysleta Del Sur Pueblo v. Texas,* 36 F.3d 1325, 1332 (5th Cir.1994), *certs. denied,* ____ U.S. ____, ____, 115 S.Ct. 1358, 1358, 131 L.Ed.2d 215 (1995); *Louisiana v. Public Investors, Inc.,* 35 F.3d 216, 219-20 (5th Cir.1994).

ACORN's original complaint alleged only that the State was in violation of § 300j-24(d). ACORN explained to the district court that, at the time suit was filed, it was not sure whether Defendants' earlier dissemination of the EPA Fact Sheet, in lieu of the list published by the EPA in the January 18, 1990 Federal Register, constituted compliance with § 300j-24(c). *ACORN,* 842 F.Supp. at 228 n. 2. After deciding that it did not, ACORN amended its complaint to allege a violation of § 300j-24(c). Some nine months after suit commenced, Defendants disseminated the Federal Register list.

Defendants contend they fully complied with §300j-24(c) prior to ACORN's institution of suit by distributing to the proper entities the February 1990 EPA Fact Sheet.[9] Accordingly, Defendants argue they were not in violation of this requirement of the LCCA at the time suit was commenced, and therefore cannot be liable for attorney's fees incurred in pressing a claim to the contrary.

ACORN argues that "publish" in §§ 300j-23(a) and -24(c) requires publication in the Federal Register. Impliedly, the district court agreed. *ACORN*, 842 F.Supp. at 229, 235 n. 26. Because the Fact Sheet was not so published, ACORN contends, Defendants did not comply with § 300j-24(c) until over nine months after suit was filed, when they finally disseminated the EPA "final list" of non-lead free drinking water coolers contained in the January 18, 1990 Federal Register. As such, ACORN continues, the lawsuit was the catalyst for Defendants' compliance, and thus ACORN is entitled to the fees it incurred in pursuing this claim.

Section 300j-24(c) provides:

> Each State shall provide for the dissemination to local educational agencies, private nonprofit elementary or secondary schools and to day care centers of the guidance document and testing protocol published under subsection (b) of this section, together with the list of drinking water coolers

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[9] A comparison of the EPA Fact Sheet distributed by the State with the list published by the Administrator in the January 18, 1990 Federal Register, which ACORN alleges was the list the LCCA requires to be disseminated, reveals that the Fact Sheet contains all of the brands and models listed in the Federal Register, plus seven others.

published under section 300j-23(a) of this title.

42 U.S.C. § 300j-24(c) (emphasis added). [10] Section 300j-23(a) calls upon the Administrator to "identify each brand and model of drinking water cooler which is not lead free" and to "*publish* a list of each brand and model of drinking water cooler [so] identified." 42 U.S.C. § 300j-23(a) (emphasis added). Neither provision unambiguously establishes how or where publication is to be made, nor do we think we need attempt to do so.

[2] Assuming arguendo "publish" equates to "publish in the Federal Register," that Defendants may have failed to comply *technically* with the statute is unpersuasive. The Fact Sheet listed all of the suspect drinking water coolers contained in the Federal Register list. In addition, the Fact Sheet listed seven other models originally thought to be non-lead free. Albeit these seven additional models were later determined to have been incorrectly included by the Administrator on the Fact Sheet, dissemination of the over-inclusive Fact Sheet does not defile the purpose of the LCCA. The error, if any, on the part of Defendants was inconsequential, in that the entities receiving the Fact Sheet were encouraged to be more, rather than less, cautious in determining which drinking water coolers in their possession posed a health risk.

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[10] There has never been any contention by ACORN that the Defendants failed to properly disseminate the EPA's guidance document and testing protocol. Notably, though, § 300j-24(b) provides that the Administrator "shall *publish* a guidance document and a testing protocol." (Emphasis added). The Administrator, having generated these documents, has never published more than a notice of their availability in the Federal Register. *See, e.g.*, Notice, 54 Fed.Reg. 14,316 (1989). Thus, the "published" documents distributed by the State in compliance with this requirment were not documents "published in the Federal Register."

ACORN is correct that Defendants distributed a list containing erroneous information.[11] However, Defendants erred in favor of the State's school children, the ultimate beneficiaries of the LCCA, and we see no reason to penalize the State for such an innocuous transgression. Accordingly, regardless of how we define "publish," as used in the LCCA, we find Defendants' distribution of the EPA Fact Sheet, in this case, sufficient to bring the State into compliance with § 300j-24(c) prior to ACORN filing suit. As such, we conclude that ACORN failed to show that Defendants violated this requirement of the LCCA, and that ACORN is therefore not entitled to attorney's fees incurred in pursuing its § 300j-24(c) claim.

B. *42 U.S.C. § 300j-24(d)*

Heeding the Supreme Court's admonition to avoid un-

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[11] ACORN contends that Defendants failure to distribute the Federal Register list is not harmless because the Federal Register contained additional information and an advisory with a toll free number regarding Halsey Taylor water coolers with lead-lined tanks. We are not swayed for two reasons. Although this information may be useful, it is not information which the LCCA requires the Administrator to compile and include in the list of non-lead free drinking water coolers. *See* 42 U.S.C. § 300j-23(a) ("[T]he Administrator shall publish a list of each brand and model of drinking water cooler identified under this subsection. Such list shall separately identify each brand and model of cooler which has a lead-lined tank. The Administrator shall continue to gather information regarding lead in drinking water coolers and shall revise and republish the list from time to time as may be appropriate as new information or analysis becomes available...."). Further, review of the EPA Fact Sheet reveals that the bottom, right-hand corner contains the following disclaimer:

> Note: A number of water coolers have been deleted from the proposed list identifying them as not lead free. For information about these water coolers and others, refer to the January 18, 1990 Federal Register notice.

Thus, persons seeking information in addition to the list of non-lead free coolers contained in the Fact Sheet are directed to the Federal Register.

necessary resolution of constitutional questions, we have foregone determining whether § 300j-24(c) breaches the Tenth Amendment. Section 300j-24(d), however, does not escape such inquiry.

In the course of oral argument, we asked the parties to submit post-argument memoranda on whether the provisions of the LCCA at issue violated the Tenth Amendment. Subsequent to these submissions, we permitted the United States to intervene to assert its views. Much of the arguments focus on whether the teachings of *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), are controlling. ACORN contends that if Congress acts legitimately under an Article I power to regulate activity, the Tenth Amendment has no sway. On the other hand, Defendants argue *New York* stands for the proposition that Congress cannot impose any requirement on the States pursuant to the exercise of its Commerce Clause power. Although we agree that *New York* is an appropriate starting point for our analysis, we recognize that neither ACORN nor Defendants properly grasp the interplay between Congress' exercise of the Article I powers and the Tenth Amendment, as that interplay was described by the *New York* Court.

1. *The Tenth Amendment*

[3] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It has been said that "[t]he amendment states but a truism that all is retained which has not been surrendered." *See United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 (1941). However, in

New York, the Supreme Court elucidated the broader effect of this amendment:

> The Tenth Amendment ... restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which ... is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine ... whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York, 505 U.S. at 156-57, 112 S.Ct. at 2418. The Tenth Amendment, therefore, incorporates extra-textual limitations upon Congress' exercise of its Article I powers. Thus, when an Act of Congress is challenged under the Tenth Amendment, we must be concerned not only with whether Congress has the power under Article I to regulate the activity in question, but also with whether the method by which Congress has chosen to regulate the activity pursuant to that power invades that province of state sovereignty protected by the Tenth Amendment. *Id.* at 158-61, 112 S.Ct. at 2419-20. In this case, the parties concede that Congress may, pursuant to its Commerce Clause power, regulate lead-contaminated drinking water coolers.[12] Accordingly, our focus is on whether the method of regulation chosen by Congress in § 300j-24(d) impermissibly intrudes upon state sovereignty. To answer this question, we begin by reviewing *New York*.

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[12] Defendants argue that, while regulating lead-contaminated drinking water coolers is within Congress' Commerce Clause power, requiring States to develop testing programs and to distribute EPA lists are not. We agree with the United States that the better approach is to focus on whether requiring such actions of the States is an appropriate *means* of regulating such drinking water coolers.

2. *The Tenth Amendment and New York v. United States*

In *New York*, the Supreme Court faced a challenge by the State of New York and two of its counties to the three-tiered incentive system contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub.L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021b *et seq.)*. The purpose of the Act was to place on each state responsibility to provide for the disposal of low-level radioactive waste generated within its borders. To encourage the States to comply with this statutory responsibility, the Act provided three types of incentives: (1) monetary incentives—i.e., a portion of surcharges received by states currently operating disposal sites were to be remitted into an escrow account operated by the Secretary of Energy who would then disburse this fund to states that complied with statutorily prescribed deadlines; (2) access incentives-i.e., states that failed to meet statutorily prescribed deadlines could be denied access to disposal sites in other states or regions; and (3) a take title provision—i.e., any state that fails to provide for disposal of waste generated within its borders by January 1, 1996, must take title to the waste, is obligated to take possession of the waste, and bears liability for all damages incurred by a generator or owner of such waste incurred as a consequence of the State's failure to take possession. The State of New York opposed all three incentive provisions, asserting *inter alia* that the incentives were unconstitutional violations of the Tenth Amendment.

The Supreme Court, speaking through Justice O'Connor, held only the take title provision unconstitutional. In reaching this conclusion, Justice O'Connor deduced that the

take title provision offered state governments a "choice" of either accepting ownership of and liability for waste or regulating its disposal according to Congress' instructions. *New York*, 505 U.S. at 175-76, 112 S.Ct. at 2428. Finding both options, standing alone, to be outside Congress' authority, she determined that a choice between them was, in fact, "no choice at all." *Id.* "Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution."[13] *Id.* (citation omitted). Indeed, she elaborated:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth

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[13] Justice O'Connor did recognize that Congress has several ways of influencing the actions of the States that comply with our notions of federalism. For example, Congress can subject state governments to laws of general applicability— i.e., laws that apply equally to the States as to private parties. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Also, under its spending power, Congress may attach to the receipt of federal funds conditions that have the affect of influencing state legislative choices. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Further, where Congress may regulate pursuant to its Commerce Clause power, it also has the power to offer States a choice of legislating according to Congressional instruction or having state law preempted by federal regulation. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

Amendment.

> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

Id. at 188, 112 S.Ct. at 2434-35.

3. *The Tenth Amendment, New York v. United States, and § 300j-24(d)*

[4] Few Congressional enactments fall as squarely within the ambit of *New York* as does § 300j-24(d). Section 300j-24(d) *requires* each State to "establish a program, consistent with this section," to assist local educational agencies, schools, and day care centers in remedying potential lead contamination in their drinking water systems. Failure or refusal to establish the mandated program subjects the States to civil enforcement proceedings. 42 U.S.C. § 300j-8(a). The States thus face a choice between succumbing to Congressional direction and regulating according to Congressional instruction, or being forced to do so through civil action in the federal courts. In actuality, this "is no choice at all." The LCCA gives the States no alternative but to enact the federal regulatory plan as prescribed in § 300j-24(d), and such Congressional conscription of state leglislative functions is clearly prohibited under *New York*'s interpretation of the limits imposed upon Congress by the Tenth Amendment.

[5,6] Congress is free, pursuant to its Commerce Clause power, to combat lead contamination in drinking water by regulating drinking water coolers that move in interstate

commerce. Such regulation,however, must operate directly upon the people, and not the States as conduits to the people. "The allocation of power contained in the Commerce Clause ... authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York,* 505 U.S. at 165, 112 S.Ct. at 2423. Section 300j-24(d) is an attempt by Congress to force States to regulate according to Congressional direction. As the *New York,* Court explained, the Constitution does not permit Congress to so control the States' legislative processes.

ACORN and the United States argue § 300j-24(d) is a valid exercise of Congress' Commerce Clause power because it affords the states complete discretion to determine the means employed in achieving the LCCA's goals. The *New York* Court addressed an identical argument and rejected it stating: "This line of reasoning ... only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress." *New York,* 505 U.S. at 177, 112 S.Ct. at 2429. Because § 300j-24(d) deprives States of the option to decline regulating non-lead free drinking water coolers, we likewise find no merit to this argument and conclude that § 300j-24(d) is an unconstitutional intrusion upon the States' sovereign prerogative to legislate as it sees fit.

IV. Conclusion

Section 330j-8(d) allows the district court to award attorney's fees "in issuing any final order in any action brought under [§ 300j-8(a)]." Section 300j-8(a)(1), in turn, allows suits against governmental instrumentalities only when the

instrumentality is alleged to be in violation of a requirement of the SDWA. We hold that Defendants distribution of the EPA Fact Sheet was sufficient to bring the State of Louisiana into compliance with the LCCA. As such, Defendants were not in violation of the requirement imposed by § 300j-24(c) at the time ACORN commenced this litigation. Further, we hold that the requirments imposed by Congress upon the States under § 300j-24(d) violate the Tenth Amendment and are unconstitutional. Hence, because ACORN has failed to establish that Defendants were in violation of any lawful requirement of the LCCA at the time it commenced this suit, the district court's award of attorney's fees to ACORN under § 300j-8(d) was improper. The judgment of the district court awarding attorney's fees to ACORN, for payment by them to their attorneys, is therefore REVERSED, and ACORN's claims are DISMISSED.

APPENDIX B

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

FILED - NOVEMBER 14, 1994

ACORN, et al.,

v.

Edwin EDWARDS, et al.

Civ. A. No. 93-1479.

United States District Court, E.D. Louisiana.

Nov. 14, 1994.

MEMORANDUM OPINION AND ORDER

CHARLES SCHWARTZ, JR, District Judge.

This case involves the on-going efforts on the part of the Association of Community Organizations for Reform Now, ("ACORN"), on behalf of private citizens to force the State of Louisiana to comply with the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. §§ 300j-24(c) and 300j-24(d), amending the Safe Drinking Water Act (SDWA), which requires state officials to distribute to Louisiana schools a list of water coolers that were not lead free and to adopt and pursue a corresponding remediation program.The result has been a long, arduous legal battle. From the outset, the state's efforts to adhere to the subject regulations was less than vigilant. Although compliance with the spirit of the regulation is presently being achieved, such was not the case until after plaintiffs' initiated the instant proceedings

and then, only after defendants' motion for summary judgment was denied and their motion for reconsideration of that ruling also was denied.

Now before the Court is plaintiffs' Motion for an Award of Attorney's Fees and Other Expenses pursuant to 42 U.S.C. § 300j-8(d), wherein the SDWA provides that "courts may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines that such an award is appropriate." Defendant herein, the State of Louisiana, timely filed formal opposition. The motion was set for an oral hearing in open court on September 28, 1994. However, the court, having the benefit of both parties' extensive pleadings and supplemental memorandum, determined that oral argument would not aid in the disposition of the matter and deemed it submitted on the briefs. After considering the comprehensive pleadings of both parties, the complete record, the applicable law, and for all of the foregoing reasons, the court GRANTS plaintiffs' Motion for an Award of Attorney's Fees and Other Expenses.

BACKGROUND

Much of the background and procedural mandates of the captioned matter have been recounted in this Court's November 15, 1993 Order and Reasons [FN1], attached hereto, and the Court incorporates same by reference. Subsequent to the above decision, the Court via its Minute Entry of May 16, 1994, denied plaintiffs' Motion for Summary Judgment, following which defendants filed yet another Motion for Summary Judgment/Alternative Motion for Partial Summary Judgment. Citing a dwindling of available resources and "reasonable improvement" in the defendants' efforts to

adhere to the LCCA guidelines, plaintiffs submitted to defendants a Motion to Dismiss under F.R.C.P. 41(a)(2); however, the defendants declined to consent to dismissal.

Pursuant to a telephone conference in which plaintiffs expressed a desire to redirect resources from litigation towards monitoring the LCCA program, defendants filed and this Court granted defendants' Motion for Summary Judgment on the grounds of mootness, reserving the parties' right to seek attorney's fees. [FN2] The issue of the plaintiffs' right to attorney's fees is now before the court.

ATTORNEY'S FEES AND THE ELEVENTH AMENDMENT

Notwithstanding the general immunity provisions of the Eleventh Amendment which act as a bar to all types of suits for damages or retroactive relief for past wrongs, a court may award attorney's fees where Congress has granted a right to such fees and where Congress has classified those fees as "costs" ancillary to a claim for prospective relief against a state. *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1979). [FN3] In the LCCA, as in the statute at issue in Hutto, [FN4] Congress has expressly provided for an award of attorney's fees:

> The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate. 42 U.S.C. § 300j-8(d). (emphasis added).

With such clear language, there can be no doubt that Congress intended for attorney's fees to be considered part of the ancillary "costs" associated with a suit for prospective relief under the LCCA. Costs traditionally have been awarded without regard to the States' Eleventh Amendment immunity, *Hutto,* 437 U.S. at 695, 98 S.Ct. at 2576, and in this matter, the Court finds no reason to depart from the Supreme Court's guidance.

Defendants herein nevertheless assert that an analogy to *Huto* is inappropriate since the applicable statute in *Hutto* provides for recovery of costs for a "prevailing party," which defendants contend is inapplicable to the instant plaintiffs.

PREVAILING PARTY STATUS

It is undisputed by both parties that to recover attorney's fees under 300j-8(d) [FN5], plaintiffs must be considered "prevailing parties," and must achieve "some success on the merits." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274 (1983) (holding that absent some degree of success on merits by claimant, it is not "appropriate" for federal court to award attorney fees in a proceeding for judicial review of emission standard promulgated under Clean Air Act, 42 U.S.C.A. § 7607(f)). "A plaintiff may be prevailing party in the absence of a judicial determination on the merits." Colorado *Environmental Coalition v. Romer*, 796 F.Supp. 457, 459 (D.Colo.1992) (awarding attorney's fees to environmental group, as the prevailing party in an effort to force state's compliance with provisions of the Safe Drinking Water Act, 42 U.S.C.A. § 300j-8(d)). Parties are considered prevailing for the purposes of an award of attorney's fees if

they "succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teacher's Ass'n. v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989) (Awarding attorney's fees to teachers' unions which challenged a school board policy because the Court found that the plaintiffs had succeeded on a "significant issue" in litigation and therefore had crossed the threshold for attorney fee award, pursuant to 42 U.S.C.A. § 1988)). In *Watkins v. Fordice*, 7 F.3d 453 (5th Cir.1993) [FN6], the Fifth Circuit devised a two part test applicable to the determination of whether a party in a case in which there has been no judicial ruling on the merits may be considered "a prevailing party." Plaintiffs herein must show (1) the goals of the lawsuit were achieved, and (2) the suit caused the defendants to remedy the complained of activity. *Id.* at 456. Furthermore, the lawsuit must be a "substantial factor or significant catalyst" in changing behavior. *Id.* (citations omitted).

First, there is no doubt that the goals of the plaintiffs' lawsuit were achieved; plaintiffs' have dismissed their claims on the grounds that they are now moot since post-summary judgment the defendants have achieved substantial compliance with the act in question and their efforts now appear diligent. As previously stated, plaintiffs continue to monitor the State defendants; compliance with the Act. As in *Watkins*, 7 F.3d at 457, this Court finds the "chronology of events particularly instructive on the role played by plain-

tiffs' lawsuit" in terminating defendants' non-compliance. Upon dismissing the defendants' first summary judgment motion, this Court noted that the timing of the state's remedial action points to a finding that the plaintiffs' lawsuit was a substantial factor:

The Court here notes that the sequence of events strongly suggests that plaintiffs' notice of intent to sue and the suit filed sixty days thereafter, has been a significant catalyst in precipitating partial compliance by the State defendants with the provisions of the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. Section 300j-21 through Section 300j-26. Only after plaintiffs sent their notice of intent to sue, did the defendants mail to Louisiana Schools a fact sheet which identified some water coolers which are not lead free. Further, only after the plaintiffs filed the instant suit did the state defendants go to the schools identified in plaintiffs' complaint and assist in the testing of water coolers as required by the LCCA.

ACORN v. Edwards, 842 F.Supp. 227, 229 n. 3 (E.D.La.1993). On February 21, 1994, the defendants discharged their duties under 42 U.S.C. § 300j-24(c) and sent the required Federal Register list, thereby fulfilling one of the two goals sought by plaintiffs.

The second objective of plaintiffs, to force defendants to expedite the testing of water coolers at participating schools, also was fulfilled once plaintiffs initiated their lawsuit. [FN7] Simply stated, plaintiffs clearly have satisfied their burden of demonstrating that their lawsuit was a significant catalyst or a substantial factor behind the altered

government action. In the case of a non-monetary prospective suit, such as the case at bar, a party prevails, despite the lack of an enforceable judgment, consent decree, or settlement, when the defendant, because of the plaintiffs' suit, modifies his behavior to conform with the plaintiffs' request, as has been clearly demonstrated by the plaintiffs in this case. It can not be disputed that the plaintiffs' suit was the very pressure that pushed the state into substantial implementation of its remediation plan and thus, into compliance with the LCCA.

Additionally, defendants contend that the instant plaintiffs are precluded from recovering attorney's fees because they have not been charged by counsel and counsel has not earned any fees. The Court disagrees. The fact that a prevailing party is represented by a public service organization or firm is irrelevant in determining whether reasonable fees are due. *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541 (1984) (Awarding attorney's fees under the Civil Rights Attorney Fees Awards Act of 1976 to private, nonprofit counsel which prevailed in a citizens class action suit challenging certain procedures utilized for termination of Medicaid benefits); See also, *Watkins v. Mobile Housing Board,* 632 F.2d 565, 567 (5th Cir.1980).

The Fact that the lion's share of jurisprudence relative to fee awards in the case of prevailing parties involves civil rights cases and concomitantly, the Civil Rights Attorney Fees Award Act of 1976, is of no moment. According to the express language of both the Civil Rights Attorney Fees Award Act of 1976 and the LCCA, the Court has within its discretion the authority to award reasonable attorney's fees as part of the costs. Although the Court believes the case

at bar may be one of first impression with respect to the LCCA, the Court is of the opinion that the attorney fee provisions of the aforesaid Acts are congruous [FN8] and thus, similar treatment is both appropriate and warranted. To hold otherwise would eviscerate the intent of Congress in creating citizen's suit provisions which enable ordinary citizens to monitor and bring suit seeking to force compliance with enacted legislation.

REASONABLENESS OF ATTORNEY'S FEES AND OTHER EXPENSES

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 433. In assessing whether hours expended are reasonable, the Supreme Court favors treating a case as a whole rather than as atomized line-items. *INS v. Jean,* 496 U.S. 154, 162 (1990). In this case, plaintiffs' attorneys culled many of the hours which they believed to be excessive for the task involved, which were redundant, and which were not adequately explained or described in their time records. Likewise, the hours spent responding to press inquiries, conferring with and preparing memoranda to law clerks, and many hours of research by law clerks were also excluded from the total hours expended by plaintiffs' counsel. Plaintiffs' attorneys' attention to efficiency obliges the Court to find that the total amount of hours for which the plaintiffs seek recompense in the form of attorney's fees is certainly reasonable.

Similarly, the Court finds the actual legal fees sought by plaintiffs reasonable. The record reflects that plaintiffs'

counsel and the supervisor of all work performed on this matter has an environmental law background and over twelve years experience in federal court litigation. As the managing attorney for the Sierra Club Legal Defense Fund, plaintiffs' counsel has given numerous lectures on the specific problems of lead contamination and has authored works on environmental law issues which have been published. The fees requested by this expert were attested to by affidavit to be reasonable in the prevailing community. The reasonableness of the plaintiffs' attorney's fees is not disputed, and this Court specifically finds that the fees sought to be charged are reasonable and commensurate with the prevailing rate in the community.

Accordingly, for all the foregoing reasons,

IT IS ORDERED that plaintiffs' Motion for an Award of Attorney's Fees and Other Expenses is HEREBY GRANTED and the defendants, Edwin Edwards, in his official capacity as Governor of the State of Louisiana, J. Christopher Pilley, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, T. Jay Ray, in his official capacity as Administrator of the Safe Drinking Water Program, Louisiana Department of Health and Hospitals, Office of Public Health, shall pay reasonable attorney's fees and expenses in the amount of forty-one thousand, one hundred eighty-one dollars and twenty five cents ($41,181.25) to plaintiffs, ACORN, Association of Community Organizations for Reform Now, Illene Sippio, individually and as tutrix for her minor daughters, Terri Sippio and Torey Sippio, and Frank Crosby, individually and as tutor of his minor son, Devin Crosby for payment of them in the same amount to their attorneys herein, Nathalie M. Walker,

Robert Baxter Wiygul, and Sharon Carr Harrington of the Sierra Club Legal Defense Fund, Inc.

The Clerk of Court shall enter judgment in accordance herewith.

ACORN, ET AL

v.

EDWIN EDWARDS, in his official capacity as Governor of the State of Louisiana;

J. CHRISTOPHER PILLEY, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals; and T. JAY RAY, in his official capacity as Administrator of the Safe Drinking Water Program, Louisiana Department of Health and Hospitals, Office of Public Health.

CIVIL ACTION NO. 93-1479
SECTION "A"(1)
MINUTE ENTRY
November 15, 1993

CHARLES A SCHWARTZ, JR., District Judge.

Before the Court is the defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Alternatively for Summary Judgment. Plaintiffs timely filed formal opposition to the aforesaid motion and the matter was submitted on the briefs without the necessity of any oral hear-

ing. For the reasons hereinafter stated, defendant's Motion to Dismiss and Alternatively for Summary Judgment is DENIED.

I. PROCEDURAL BACKGROUND.

On February 17, 1993, plaintiffs sent defendants a "Notice of Intent to Sue" letter (Plaintiff's Exhibit "12") as required by 42 U.S.C. § 300j-8, alleging violations of sections 300j-24(c) (failure to send EPA's published list of water coolers that are not lead free) and § 300j-24(d)(1) & (3) (failure to have a remedial program to ensure testing, etc. of water coolers by January 31, 1990). Subsequent to the receipt of the "notice to sue" letter, defendants sent schools an EPA fact sheet which identified some water coolers which are not lead free. [FN1]

On May 4, 1993, plaintiffs filed suit against the State defendants alleging, at first, only a violation of 42 U.S.C. § 300(d)(1) & (3). [FN2] Thereafter, plaintiffs amended their complaint to allege a violation of 42 U.S.C. § 300j-24(c), having had the opportunity to research and investigate the issue of whether state defendants' dissemination of the EPA "Fact Sheet" on April 5, 1993 constituted compliance with the LCCA.

The obvious purpose of plaintiffs' citizen suit against the State defendants is to force their compliance [FN3] with the provisions of the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300j-24(c) and 24(d), amending the Safe Drinking Water Act (SDWA). Specifically, plaintiffs seek an order compelling the State defendants to distribute to Louisiana Schools, as mandated, the "list of drinking water coolers [which are not "lead free"] published under section 300j-23(a)" [FN4] and to establish a remedial program which

is adequate to ensure that all water coolers which are not lead free and which are located in the participating schools are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found not to contribute lead to drinking water. [FN5] Considering that the timetable established by the statute requires that State institute a remedial program which would ensure that such would be accomplished by January 31, 1990, the plaintiffs apparently seek an order that would ensure the State defendants proceed with due haste to comply with the terms of the LCCA, so as to minimize the risk that their children will contract lead poisoning.

While there are no reported decisions involving the merits of a citizen suit brought under the SDWA to enforce the provisions of the LCCA, a thorough search for authorities did reveal one reported decision, *Colorado Environmental Coalition v. Romer,* 796 F.Supp. 457 (D.Colo.1992), wherein the district court awarded attorneys fees and costs under the citizen suit provisions of the SDWA in the amount of $21,193.50 although the case settled and resulted in a stipulated consent decree one day after suit was filed. That court concluded that plaintiff's action was the catalyst for the defendant's acquiescence and the consent decree provided the precise relief plaintiff sought in its complaint, to wit: (1) the defendants disseminate to Colorado day care centers the documents that the LCCA required it to distribute years before the suit was instituted; and (2) that the defendants establish a remedial program consistent with section 300j-24(d)(1) of the Act.

In the *Colorado Envioronmental Coalition* case, there apparently was no question that the Colorado En-

vironmental Coalition, an environmental group seeking attorney's fees under the SDWA had standing and was entitled to compensation for time spent after filing notice of intent to sue, even though the state claimed that it had agreed to settle upon receiving such notice. The district court was of the opinion that given the state's failure to comply with the statutory requirements for nearly three years, it was reasonable for the group to prepare for full-blown litigation even in the midst of settlement negotiations that ultimately resulted in a consent decree.

II. SDWA/LCCA.

The LCCA mandates that the Environmental Protection Agency ("EPA") undertake two duties: (1) "after notice and opportunity for public comment" and "usi [ing] the best information available, ... [the EPA] shall publish a list of each brand and model of drinking water cooler ... which is not lead free, [FN6] including each brand and model of drinking water cooler.. which has a lead lined tank." [FN7] In compliance with section 300j-23(a) of the LCCA, the EPA published the required list of water coolers in the January 18, 1990, Federal Register. 55 Fed.Reg. 1772 (1990).

Regarding state programs, the LCCA requires that by August 1, 1989:

> each State shall establish a program ... to assist educational agencies in testing for and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.... [This] program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located

in schools. Such measures shall be adequate to ensure that [by January 31, 1990], all such water coolers in schools under the jurisdiction of [local educational agencies] are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found ... not to contribute lead to drinking water. [FN8]

The LCCA does not expressly impose a mandatory duty on the local educational agencies/schools to either test for or remedy lead contamination. Participation of the schools and local agencies is voluntary. [FN9] However, when a school chooses to voluntarily participate in a state program, the statute clearly mandates that the state provide the remedial measures discussed above.

III. DISMISSAL/SUMMARY JUDGMENT IS INAPPROPRIATE.

Defendants' contentions on its Motion to Dismiss/Summary Judgment are that: plaintiffs lack "standing" to pursue this matter, and that its lack of standing is sufficiently jurisdictional to require dismissal under FRCP Rule 12(b)(1); and that plaintiffs' alleged failure to comply with the notice requirements of 42 U.S.C. § 300j-8(b) [FN10] is jurisdictional and thus, requires dismissal.

Under the SDWA, EPA regulations provide that the notice letter shall include:

(1) sufficient information to permit the recipient to identify the specific requirement alleged to have been violated,

(2) the activity alleged to constitute a violation,

(3) the person or *persons responsible* for the alleged violation,

(4) the date or dates of the alleged violation, and

(5) the full name, address, and telephone of the person giving notice.

40 C.F.R. § 135.12(a). As more fully explained herein below, the plaintiffs' Notice Letter complies with the requirements set forth above.

Plaintiff's 60-Day Notice Letter cites the two requirements of the LCCA that the defendants have allegedly violated, to wit:

The suit will allege that officials of the State of Louisiana are in violation of section 300j-24(c) of the Act, which addresses dissemination of the Environmental Protection Agency's ("EPA") list of lead contaminated water coolers to schools and day care facilities, and section 300j-24(d) of the Act, which concerns remediation of lead contamination in drinking water consumed by school children.

The Act requires the Administrator of the EPA to identify and publish a list of the brands and models of drinking water coolers which are not lead free by February 8, 1989. 42 U.S.C. § 300j-23(a). The Act also requires each state to distribute the EPA list of water coolers to schools and day care facilities, and to establish a remedial action program to ensure that EPA listed water coolers are disconnected, repaired, or removed from schools by January 31, 1990. 42 U.S.C. § 300j-24(c) and (d).

Section 300j-24 provides in pertinent part:

Within 9 months after October 31, 1988, each State shall establish a program, consistent with this section, to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

* * *

In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure within 15 months after October 31, 1988, all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the water cooler is tested and found (within the limits of testing accuracy) not to contribute lead to drinking water.

42 U.S.C. § 300j-24(d)(1)-(3).

The State of Louisiana has failed to distribute the EPA list of water coolers to schools and day care facilities. Accordingly, many Louisiana schools and day care facilities continue to be unaware of the presence of lead contaminated water coolers in their schools since the State has failed to provide them with this information in violation of section 300j-24(c).

The State of Louisiana has also failed to implement a remedial action program consistent with section 300j-24(d). Specifically, the State has failed to create measures to ensure the removal, repair, replacement, or disconnection of all water coolers contaminated by lead by January 1, 1990. The school children of this State continue to be exposed to potentially dangerous lead levels from drinking water coolers at their schools and day care centers in direct violation of section 300j-24(d). [FN11]

The Court is of the opinion that because the specific requirements of the LCCA were directly cited by the plaintiffs to the defendants and that the particular aspects of the defendants' failure to comply with such requirements were adequately explained within the four corners of plaintiffs' 60-day Notice Letter, the defendants had more than sufficient information to identify the specific requirements allegedly violated within the meaning of 40 C.F.R. § 135.12(a).

Defendants' reliance on *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 36 ERC 1833 (D.N.J.1993) (a Clean Water Act case) is misplaced. As the plaintiffs aptly point out, the citizen suit provision of the CWA is narrowly drawn and can only be brought by an "adversely affected" person against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by [EPA] or a State with respect to such a standard or limitation...." 33 U.S.C. 1365(a)(1) (emphasis supplied). EPA regulations promulgated under the CWA require a citizen suit notice letter to "include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated...." 40 C.F.R. § 135.3(a).

In contrast, a citizen suit under the SDWA can be

brought by any person (i.e., there is no requirement that the person be "adversely affected") against any person "alleged to be in violation of any requirement prescribed by the subchapter." 42 U.S.C. § 300j-8(a)(1). EPA regulations under the SDWA commensurately require a citizen suit to "include sufficient information to permit the recipient to identify the specific requirement alleged to have been violated...." 40 C.F.R. § 135.12(a).

The precise holding of *Hercules,* was that under EPA's CWA notice regulations, the "monitoring", "reporting", and "recordkeeping" violations, which were not specifically identified in plaintiff's original notice letter, could not be added to plaintiff's citizen suit without first being noticed under the EPA regulations. *Hercules,* 36 ERC at 1840-41. In other words, *Hercules* stands for the proposition that violations alleged in the citizen's suit under the CWA which were not the subject of the notice letter are not properly before the court.

Plaintiffs in the case at bar have not sought leave to add any specific requirement violations to their citizen suit that were not addressed in their notice letter. Defendant's argument that it is not obliged by the SDWA to send the EPA's final list of water coolers published in the January 18, 1990 Federal Register goes to the merits of the plaintiffs' citizen suit and is not properly invoked as an argument requiring dismissal of plaintiffs' suit for lack of Article III standing. The Court further rejects defendants' argument that plaintiffs' informational interests must be a requirement under the SDWA, and thus identified in the notice letter. As plaintiffs' memorandum in response to defendants' reply brief aptly points out, EPA regulations do not require that plain-

tiffs' injuries be included in the 60-day Notice Letter.

In the case at bar it is allegedly the defendants' continuing inactivity or failure to comply with the requirements of the SDWA which constitute violations of the Act. It cannot be seriously argued that the plaintiffs' 60-day Notice Letter was deficient with respect to notifying defendant's of their alleged continuing failure to comply with the provision of the SDWA (i.e., failure to distribute the EPA's list of water coolers and failure to implement a remedial action program consistent with section 300j-24(d)).

Moreover, and as required, plaintiffs' 60-day Notice Letter was addressed to all defendants and stated that the forthcoming citizen suit would "allege that officials of the State of Louisiana are in violation of " the provisions discussed herein above. There can be no serious dispute that the 60-day notice adequately identifies the location of the alleged violations, to wit: schools and day care facilities under the jurisdiction of the Louisiana Department of Health and Hospitals, where the defendant officials of the State of Louisiana, Pilley and Ray, are employed. Their address is contained in plaintiffs' notice letter. The Court agrees with the plaintiffs, that whereas here the alleged violation is inactivity or a failure to comply with the SDWA, the location requirement is somewhat anomalous.

There is no question that plaintiffs' 60-day notice letter accurately identifies the dates of the alleged violations stating that defendant's violations are continuing.

Defendants contend that plaintiff ACORN (Association of Community Organizations for Reform Now) did not give

notice, but rather, Louisiana ACORN gave notice. Plaintiffs' submissions on summary judgment clearly show that both "ACORN" and "Louisiana ACORN" are one and the same organization. Therefore, the Supreme Court's decision in *Hallstrom v. Tillamook County,* 493 U.S. 20, 110 S.Ct. 304 (1989) is inapposite. The facts of *Hallstrom* were that petitioners completely failed to send any notice at all to the appropriate parties prior to filing a citizen suit pursuant to the Resource Conservation and Recovery Act (RCRA). [FN12]

In April of 1981, believing Tillamook County's landfill operation violated standards under the RCRA, petitioners in *Hallstrom* sent written notice of their intent to suit to the County. A year later petitioners filed suit. Petitioners completely failed to notify Oregon's Department of Environmental Quality and the EPA as required by § 6972(b)(1), the appropriate notice provision. The Supreme Court held that the district court must dismiss the action as barred by the statute since the statute itself put petitioners on notice of the requirements for bringing a citizen suit with which requirements petitioners failed to comply.

Plaintiffs in the case at bar, which include ACORN (i.e., identified in the Notice to Sue Letter as Louisiana ACORN), Sippio and Crosby, served adequate notice. Defendants do not deny that plaintiffs Sippio and Crosby served adequate notice or notice which substantially complied with the requirements.

EPA regulations governing the adequacy of required 60-day notice provide that notice must "include sufficient information to permit the recipient to identify ... the full name, address, and telephone number of the person giving notice."

[FN13] Plaintiffs' notice letter sets forth the correct business address and telephone number of plaintiff ACORN, as well as, the names, addresses and telephone numbers of plaintiffs Sippio and Crosby.

In *Connecticut Coastal Fisherman's Association v. Remington Arms Company, Inc.*, 777 F.Supp. 173 (D.Conn.1991), [FN14] the court held that although the name on the notice to sue letter identified the plaintiff as "Connecticut Coastal Sportsman's Association," [FN15] plaintiffs gave sufficient notice under the citizen suit provision of the RCRA. Discussing the Supreme Court's decision in *Hallstrom,* the court in *Connecticut Coastal Fisherman* determined that notice was sufficient so long as the organization remained the same and that the mere change in the name of the organization did not alter the fact that the defendants received the requisite notice of intent to sue. [FN16]

In the case at bar, the plaintiff Louisiana ACORN has submitted affidavits and other documents supporting its statement that Louisiana ACORN and ACORN are one and the same organization and the defendants have submitted no evidence to the contrary. Notwithstanding the foregoing, considering the fact that plaintiffs Sippio and Crosby gave proper notice, ACORN is deemed to have "substantially complied" with statutory requirements of notice.[FN17]

Moreover, defendants' contention that plaintiffs' suit must be dismissed for failure to notify the Orleans Parish School Board is wholly without merit. 40 C.F.R. 135.11 only requires that a notice letter under SDWA be served upon "an alleged violator." A thorough review of the plaintiffs' complaint in the captioned case reveals no allegations against

the Orleans Parish School Board. The only defendants named are the state defendants listed in the foregoing caption. Finally, sections 300j-24(d)(1) & (3) and section 300j-24(c) (i.e., the sections which form the basis of plaintiffs' lawsuit against the state defendants) only address obligations of the state and not obligations of schools or school boards.

The Court is further of the opinion that ACORN has standing to bring this action because it satisfies the requirement set forth by the Fifth Circuit in *Save Our Community v. U.S.E.P.A.*, 971 F.2d 1155, 1160 (5th Cir.1992) [FN18], to wit:

Representational standing is appropriate where: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of the individual members in the lawsuit.' *Id.*

The Fifth Circuit explained that the "[s]tanding analysis focuses upon '[w]hether a party has a sufficient stake in an otherwise justifiable controversy to obtain judicial resolution of that controversy.' " *Id.*

ACORN satisfies the above enumerated requirements for organizational standing. The "zone of interests" test enunciated in *Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3187 (1990) [FN19] cited in plaintiff's brief does not apply to this case. ACORN's case was brought pursuant to the citizen suit provision of the SDWA (i.e., 42 U.S.C. § 300j-8), which authorizes suits by "any person." [FN20]

The first factor under the test enunciated in *Save Our Community,* requires this Court to determine whether any of ACORN's "members would otherwise have standing to sue in their own right." [FN21] The requirement is satisfied if the organization's members, "or any one of them, are suffering immediate or threatened injury as a result of the challenged action." [FN22] The Fifth Circuit in *Save Our Community* noted that other courts have also recognized the low threshold for sufficiency of injury. The purpose of the inquiry is to determine whether the requisite injury really has occurred or will occur in the future to members of the organizations. [FN23]

ACORN has submitted the affidavits of the two of its members and its Head Organizer (Plaintiffs' Exhibits 1, 2, and 3). The affidavits of Williams and Herbert establish that they are parents of children attending schools in the state of Louisiana which have water coolers in operation that are listed on the EPA's list published in the Federal Register as being "not lead free." Beth Butler, Acorn's Head Organizer's affidavit establishes among other things, that (1) the purpose of the organization is to attain the advancement of low and moderate income people as citizens of the United States and their respective communities and states, in every area of their interest and concern; (2) that Louisiana ACORN members are concerned about their children being exposed to potential lead poisoning and it has conducted meetings, forums, etc. focusing upon its members concerns regarding lead poisoning; (3) Louisiana Acorn members include approximately 4000 families throughout the state of Louisiana who have children that attend schools throughout the state; and (4) that the defendants' failure to properly implement the LCCA has adversely affected ACORN members throughout the state,

not just in Orleans Parish, who have children attending schools who have not received the EPA's "FINAL LIST" published in the Federal Register and which have coolers which are not "lead free" in operation without any testing.

Injury in fact may be shown by the adverse effect of defendants' alleged failure to comply with the dictates of the LCCA insofar as any such failure to comply increases the risk that ACORN member's children will be exposed to lead poisoning. The defendants' cannot seriously argue the risk of harm is absent where State compliance with the LCCA's terms is mandated in order to obviate the attendant risk of lead poisoning of school children drinking from water coolers which are "not lead free" and have not been tested.

The Court finds the House Committee Report which accompanied section 1431 of the SDWA and which discusses its imminent hazard provision instructive, wherein it is stated:

> Furthermore, while the risk of harm must be "imminent" for the Administrator to act, the harm itself need not be. Thus, for example, the Administrator may invoke this section when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency.
> Among those situations in which endangerment may be regarded as "substantial' are the following:
>
> (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken;
>
> (2) a substantial statistical probability that disease will

result from the presence of contaminants in drinking water:,or.

(3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants....) H.R. Rep. No. 1185, 93rd Cong., 2d Sess. 35-36, reprinted in [1974] U.S. Code & Cong.Ad.News 6454, 6487-88. [FN24]

Plaintiff ACORN members have met any requirement of showing that the threat to their interests are "actual or imminent" and not simply conjectural or hypothetical. ACORN points out in its opposition memorandum that ACORN members William and Herbert have children currently attending schools which have water coolers which are not lead free presently in operation and therefore, their children are immediately threatened with harm.

IV. CONCLUSION.

Plaintiffs have demonstrably fulfilled the congressional policies underlying the subject notice requirements, to wit: (1) via plaintiffs' 60-day Notice Letter, they have allowed governmental agencies an opportunity to enforce the law; [FN25] and (2) they have allowed the state defendants (i.e., alleged violators) the opportunity to comply with the law, either of which could render their citizen suit unnecessary. [FN26] For all of the above and foregoing reasons, the Court is of the opinion that plaintiffs have given adequate notice and have standing to bring their citizen suit. Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss for Lack of Jurisdiction and Alternative Motion for Summary Judgment is hereby DENIED.

FN1. Via Order & Reasons entered November 15, 1993, this Court denied defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction or Alternative Motion for Summary Judgment, finding that ACORN has representational standing to bring suit and that plaintiffs had satisfied the requirements to overcome the summary judgment hurdle.

FN2. See Minute Entry of June 2, 1994.

FN3. An award of attorney's fees was proper in civil rights suit brought by state prisoners against officers of State Department of Correction in their official capacities as a result of officers' failure to cure constitutional violations in prisons. Additionally, attorney's fees for the appellate process were awarded, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988 (1976 ed.), which provides that in suits under 42 U.S.C. § 1983 and certain other statutes, federal courts may award prevailing parties reasonable attorneys fees "as part of the costs."

FN4. 42 U.S.C. § 1988 provides in pertinent part:
(b) Attorney's fees
In any action or proceeding to enforce a provision ... the court, in its discretion may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs.

FN 5. The Court notes that the language of the statute at issue in this case, 42 U.S.C. §300j-8(d), unlike the statute at issue in *Hutto*, 42 U.S.C. § 1988(b), does not explicitly call for a "prevailing party," although in determining whether such an award is "appropriate" the court must consider the status of the party seeking an award of attorney's fees. An award is "appropriate" when a party has advanced the goals of the statute involved in the litiga-

tion. *Chemical Manufacturer's Association v. U.S. E.P.A.*, 885 F.2d 1276, 1279 (5th Cir.1989).

FN6. Despite Extrajudicial resolution of case, involving Voting Rights Act of 1965, 42 U.S.C.A. § 19731(e)[sic], and the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C.A. § 1988, attorneys fees were awarded but the case was remanded for reexamination of a reasonable hourly rate.

FN7. Between January 31, 1990, the effective date of the LCCA, and June 1, 1993, shortly after plaintiffs originally filed suit, only 12,812 water coolers had been inspected. This figure indicates that only 56% of the coolers located in participating schools had been inspected over a period of thirty-seven months. Once plaintiffs filed suit, the remaining 44% of the coolers located in participating schools were tested in only nine months. These statistics are strongly indicative of the fact that plaintiff's citizen suit and the ensuing legal proceedings were the catalyst which accelerated defendants' efforts and forced their compliance with regulations of the LCCA.

FN8 Cf. *Dugue v. City of Burlington*, 935 F.2d 1343, 1357 (2nd Cir.1991), cert. *granted in part*, 112 S.Ct., and *rev'd on other grounds*, 112 S.Ct. 2638 (1992) (affirming an award of attorney's fees to plaintiffs as prevailing parties under the RCRA, 42 U.S.C. § 6972, and the CWA, 33 U.S.C. § 1365, and noting that "most of the cases cited involve the Attorney's Civil Rights Fee Awards Act, 42 U.S.C. § 1988, the principles governing fee awards under that act[sic] are applicable to the attorney's fee provisions before us because of their substantially similar language.")

FN1. By its terms section 42 U.S.C. § 300j-24(c) requires the defendants to "provide for the dissemination to [schools] ... the list of drinking water coolers published under section 300j-23(a) of this title." The final list of water coolers was published by the EPA in the January 18, 1990, Federal Register, in which publication it expressly acknowledges that it is its "final list" of water coolers "issued pursuant to the Lead Contamination Control Act of 1988." 55 Fed.Reg. 1772 (1990) (Plaintiff's Exhibit "8").

FN2. Plaintiffs explained that at the time they filed suit, they had not determined whether defendants' dissemination of the EPA "Fact Sheet" instead of the required final list published in the Federal Register constituted compliance with the LCCA.

FN3. The Court here notes that the sequence of events strongly suggests that plaintiffs' notice of intent to sue and the suit filed sixty days thereafter, has been a significant catalyst in precipitating partial compliance by the state defendants with the provisions of the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300j-21 through 300j-26. Only after plaintiffs sent their notice of intent to sue, did the defendants mail to Louisiana Schools a fact sheet which identified some water coolers which are not lead free. Further, only after the plaintiffs filed the instant suit did the state defendants go to the schools identified in plaintiffs' complaint and assist in the testing of water coolers as required by the LCCA. Plaintiffs suggest that even without the benefit of discovery, the summary judgment evidence supports their contention that the defendants remain in violation of the LCCA's strict mandate, inter alia, that all coolers that are not lead free be tested, and repaired, replaced, or removed (as testing war-

rants) by January 31, 1990. The summary judgment record, and more particularly plaintiffs' Exhibit "7", indicates that as of June 1993, approximately 55% of the schools participating in the state's LCCA program have still not had their water coolers which are on the EPA published list tested.

FN4. 42 U.S.C. § 300j-24(c).

FN5. 42 U.S.C. § 300j-24(d).

FN6. With respect to a drinking water cooler, "lead free" means:
that each part or component of the cooler which may come in contact with drinking water contains not more than 8 percent lead, except that no drinking water cooler which contains any solder, flux, or storage tank interior surface which may come in contact with drinking water shall be considered lead free if the solder, flux, or storage tank interior surface contains more that 0.2 percent lead. 42 U.S.C. § 300j-21(2).

FN7. 42 U.S.C. § 300j-21(2).

FN8. 42 U.S.C. § 300j-24(d)(1) & (3).

FN9. Section 300j-24(d)(2) does impose a mandatory duty on participating local educational agencies to make testing results available to the public.

FN10. 42 U.S.C. § 300j-8(b) provides in pertinent part:
No civil action may be commenced—
(1) Under subsection (a)(1) of this section respecting a violation of a requirement prescribed by or under this subchapter—

(2) prior to sixty days after the plaintiff has given notice of such violation (i) to the Administrator (ii) to any alleged violator of such requirement and (iii) to the State in which the violation occurs.

FN11. Excerpt from Plaintiffs' LCCA 60-day Notice Letter dated February 17, 1993 (Plaintiffs' Exhibit "1")

FN12. The 60-day notice provision, 42 U.S.C. § 6972(b)(1) of the RCRA was modeled upon § 304 of the Clean Air Amendments of 1970. *Hallstrom v. Tillamook County,* 110 S.Ct. 304, 307 (1989). The SDWA 42 U.S.C. § 300j-8(b) has also incorporated a 60-day notice provision patterned after § 304. *Id.*

FN13. 40 C.F.R. 135.12.

FN14. In *Connecticut Coastal Fisherman's Association* (CCFA), plaintiff CCFA brought suit against the owners and operators of a trap and skeet shoot club alleging violations of the Clean Water Act and the RCRA.

FN15. Plaintiff organization's name as reflected in its Articles of Incorportion was actually "Connecticut Coastal Fisherman's Association."

FN 16. The plaintiff in *Connecticut Coastal Fisherman* submitted affidavits supporting its statement that the CCSA changed its name to CCFA, but otherwise remained the same and no evidence was submitted to the contrary. Accordingly, the Court held that there is no genuine issue as to the material fact that the defendants received the requisite notice of intent to sue from plaintiff. 777 F.Supp. at 187.

FN17. See, *e.g., Student Public Interest Research Group of New Jersey v. AT & T Bell Laboratories,* 617 F.Supp 1190, 1194 (D.C.N.J.1985). In that case, the defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted, raising the issues whether plaintiffs had standing, raising the argument that because one of plaintiffs, Friends of Earth (FOE), should be precluded from participation in the suit because it failed to give the requisite 60-day notice under the Federal Water Pollution Control Act. The defendant acknowledged that the plaintiff Student Public Interest Research Group (SPIRG) complied with the notice provisions. The court held "that because one plaintiff served adequate notice, both plaintiffs 'substantially complied' with the requirements, and the defendant's right to adequate notice was preserved." *Id.* at 1193-94.

FN18. In the *Save Our Community* case, appellant Trinity challenged the SOC's Article III standing to sue seeking enforcement of the Clean Water Act (CWA) under it citizen suit provision. SOC sought to represent the interests of its members.

FN19. In *Lujan,* suit was brought under section 10 of the Administrative Procedures Act (APA), 5 U.S.C. § 702, which requires a plaintiff to be within the "zone of interests" that the aforesaid statute was designed to protect. 110 S.Ct. at 3186.

FN20. See *e.g., Save Our Community (SOC) v. U.S.E.P.A.,* 971 F.2d 1155, 1160 n. 10 (5th Cir.1992) (holding that the Clean Water Act (CWA) confers standing to the limits of the Constitution since under the (CWA "any citizen may commence a civil action.")

FN21. 971 F.2d at 1160.

FN22. *Warth v. Seldin,* 442 U.S. 490, 511 (1975).

FN23. *Public Citizen v. F.T.C.,* 869 F.2d at 1152.

FN24. *United States v. Northeastern Pharm. & Chem. Co.,* 579 F.Supp. 823, 846 n. 28 (W.D.Mo.1984).

FN25. The plaintiffs' 60-day Notice Letter was sent to the EPA, the United States Department of Justice, and the Louisiana Attorney General.

FN26. In response to the plaintiffs' 60-day notice letter, the defendants instead of sending the EPA list of water coolers published in the January 18, 1990 Federal Register sent an "EPA Fact Sheet." Essentially, the defendants were given the opportunity to comply but elected to send the "EPA Fact Sheet."

APPENDIX C

UNITED STATES CONSTITUTION, AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX D

42 USC § 300j-8(b)(1)

(b) Conditions for commencement of civil action; notice

No civil action may be commenced—

(1) under subsection (a)(1) of this section respecting violation of a requirement prescribed by or under this subchapter—

(A) prior to sixty days after the plaintiff has given notice of such violation (i) to the Administrator, (ii) to any alleged violator of such requirement and (iii) to the State in which the violation occurs, or

(B) if the Administrator, the Attorney General, or the State has commenced and is diligently posecuting a civil action in a court of the United States to require compliance with such requirement, but in any such action in a court of the United States any person may intervene as a matter of right; or

APPENDIX E

42 U.S.C. § 300(d)

(d) Costs; attorney fees; expert witness fees; filing of bond

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

APPENDIX F

42 U.S.C. §§ 300j-21 - 300j-25

42 § 300j-21. Definitions

As used in this part—

(1) Drinking water cooler

The term "drinking water cooler" means any mechanical device affixed to drinking water supply plumbing which actively cools water for human consumption.

(2) Lead free

The term "lead free" means, with respect to a drinking water cooler, that each part or component of the cooler which may come in contact with drinking water contains not more than 8 percent lead, except that no drinking water cooler which contains any solder, flux, or storage tank interior surface which may come in contact with drinking water shall be considered lead free if the solder, flux, or storage tank interior surface contains more than 0.2 percent lead. The Administrator may establish more stringent requirements for treating any part or component of a drinking water cooler as lead free for purposes of this part whenever he determines that any such part may constitute an important source of lead in drinking water.

(3) Local educational agency

The term "local educational agency" means—

(A) any local educational agency as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381),

(B) the owner of any private, nonprofit elementary or secondary school building, and

(C) the governing authority of any school operating under the defense dependent's education system provided for under the Defense Dependent's Education Act of 1978 (20 U.S.C. 921 and following).

(4) Repair

The term "repair" means, with respect to a drinking water cooler, to take such corrective action as is necessary to ensure that water cooler is lead free.

(5) Replacement

The term "replacement", when used with respect to a drinking water cooler, means the permanent removal of the water cooler and the installation of a lead free water cooler.

(6) School

The term "school" means any elementary school or secondary school as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20

U.S.C. 2854) and any kindergarten or day care facility.

(7) Lead-lined tank

The term "lead-lined-tank" means a water reservoir container in a drinking water cooler which container is constructed of lead or which has an interior surface which is not lead free.

§ 300j-22. Recall of drinking water coolers with lead-lined tanks

For purposes of the consumer Product Safety Act [15 U.S.C.A. § 2051 et seq.], all drinking water coolers identified by the Administrator on the list under section 300j-23 of this title as having a lead-lined tank shall be considered to be imminently hazardous consumer products within the meaning of section 12 of such Act (15 U.S.C. 2061) 15 U.S.C.A. § 2061]. After notice and opportunity for comment, including a public hearing, the Consumer Product Safety Commission shall issue an order requiring the manufacturers and importers of such coolers to repair, replace, or recall and provide a refund for such coolers within 1 year after October 31, 1988. For purposes of enforcement, such order shall be treated as an order under section 15(d) of that Act (15 U.S.C. 2064(d)) [15 U.S.C.A. § 2064(d)].

§ 300j-23. Drinking water coolers containing lead

(a) Publication of lists

The Administrator shall, after notice and opportunity for public comment, identify each brand and model of drink-

ing water cooler which is not lead free, including each brand and model of drinking water cooler which has a lead-lined tank. For purposes of identifying the brand and model of drinking water coolers under this subsection, the Administrator shall use the best information available to the Environmental Protection Agency. Within 100 days after October 31, 1988, the Administrator shall publish a list of each brand and model of drinking water cooler identified under this subsection. Such list shall separately identify each brand and model of cooler which has a lead-lined tank. The Administrator shall continue to gather information regarding lead in drinking water coolers and shall revise and republish the list from time to time as may be appropriate as new information or analysis becomes available regarding lead contamination in drinking water coolers.

(b) Prohibition

No person may sell in interstate commerce, or manufacture for sale in interstate commerce, any drinking water cooler listed under subsection (a) of this section or any other drinking water cooler which is not lead free, including a lead-lined drinking water cooler.

(c) Criminal penalty

Any person who knowingly violates the prohibition contained in subsection (b) of this section shall be imprisoned for not more than 5 years, or fined in accordance with Title 18, or both.

(d) Civil penalty

The Administrator may bring a civil action in the ap-

propriate United States District Court (as determined under the provisions of Title 28) to impose a civil penalty on any person who violates subsection (b) of this section. In any such action the court may impose on such person a civil penalty of not more than $5,000 ($50,000 in the case of a second or subsequent violation).

§ 300j-24. Lead contamination in school drinking water

(a) Distribution of drinking water cooler list

Within 100 days after October 31, 1988, the Administrator shall distribute to the States a list of each brand and model of drinking water cooler identified and listed by the Administrator under section 300j-23(a) of this title.

(b) Guidance document and testing protocol

The Administrator shall publish a guidance document and a testing protocol to assist schools in determining the source and degree of lead contamination in school drinking water supplies and in remedying such contamination. The guidance document shall include guidelines for sample preservation. The guidance document shall also include guidance to assist States, schools, and the general public in ascertaining the levels of lead contamination in drinking water coolers and in taking appropriate action to reduce or eliminate such contamination. The guidance document shall contain a testing protocol for the identification of drinking water coolers which contribute to lead contamination in drinking water. Such document and protocol may be revised, republished and redistributed as the Administrator deems necessary. The Administrator shall distribute the guidance

document and testing protocol to the States within 100 days after October 31, 1988.

(c) Dissemination to schools, etc.

Each State shall provide for the dissemination to local educational agencies, private nonprofit elementry or secondary schools and to day care centers of the guidance document and testing protocol published under subsection (b) of this section, together with the list of drinking water coolers published under section 300j-23(a) of this title.

(d) Remedial action program

(1) Testing and remedying lead contamination

Within 9 months after October 31, 1988, each State shall establish a program, consistent with this section, to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

(2) Public availability

A copy of the results of any testing under paragraph (1) shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such testing results.

(3) Coolers

In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure that within 15 months after October 31, 1988, all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found (within the limits of testing accuracy) not to contribute lead to drinking water.

§ 300j-25. Federal assistance for State programs regarding lead contamination in school drinking water

(a) School drinking water programs

The Administrator shall make grants to States to establish and carry out State programs under section 300j-24 of this title to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from drinking water coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies. Such grants may be used by States to reimburse local educational agencies for expenses incurred after October 31, 1988 for such testing and remedial action.

(b) Limits

Each grant under this section shall be used as[1] by the

---

[1] So in original.

State for testing water coolers in accordance with section 300j-24 of this title, for testing for lead contamination in other drinking water supplies under section 300j-24 of this title, or for remedial action under State programs under section 300j-24 of this title. Not more than 5 percent of the grant may be used for program administration.

(c) Authorization of appropriations

There are authorized to be appropriated to carry out this section not more than $30,000,000 for fiscal year 1989, $30,000,000 for fiscal year 1990, and $30,000,000 for fiscal year 1991.

Supreme Court, U.S.
FILED
SEP 30 1996
CLERK

No. 96-174

In the Supreme Court of the United States

OCTOBER TERM, 1995

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL., PETITIONERS

v.

MIKE FOSTER, GOVERNOR OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Lead Contamination Control Act of 1988, 42 U.S.C. 300j-24(d), which provides that each State is to develop a program to remove lead contamination from the water coolers in the schools in the State, contravenes the Tenth Amendment to the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-174

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL., PETITIONERS

v.

MIKE FOSTER, GOVERNOR OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 81 F.3d 1387. The opinion of the district court on attorney's fees (Pet. App. A19-A28) is unreported. The district court's earlier opinion, denying the state respondents' dispositive motions (Pet. App. A28-A59), is reported at 842 F. Supp. 227.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1996. The petition for a writ of certiorari was filed on July 22, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Lead Contamination Control Act of 1988 (LCCA or the Act), 42 U.S.C. 300j-21 *et seq.*, Congress addressed the pressing health problems caused by lead contamination in drinking water. Of particular concern to Congress was the threat posed to children by lead contamination in school water coolers. Congress accordingly directed the Environmental Protection Agency (EPA) to publish, after notice and comment, a list of the brands and models of water coolers that are not "lead free," 42 U.S.C. 300j-23(a), and to distribute that list of water coolers to the States, 42 U.S.C. 300j-24(a). EPA was also required to publish and distribute to the States a guidance document and testing protocol designed to assist schools in determining the source and degree of lead contamination in their drinking water. 42 U.S.C. 300j-24(b).

Each State, in turn, was called upon to disseminate the information received from EPA to local educational agencies within the State. 42 U.S.C. 300j-24(c). In addition, the Act provided that each State "shall establish a program * * * to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools." 42 U.S.C. 300j-24(d)(1). That program was to include measures "adequate to ensure that within 15 months after October 31, 1988, all [lead contaminated] water coolers in schools under the jurisdiction of [local educational] agencies are repaired, replaced, permanently removed or rendered inoperable." 42 U.S.C. 300j-24(d)(3). The Act authorized federal financial assistance for these

programs, 42 U.S.C. 300j-25, but none has ever been appropriated.

2. Following passage of LCCA, EPA developed the guidance document and testing protocol required by the Act. The guidance document was designed to assist "the school official" in understanding the significance of detecting and reducing lead contamination in schools. See Environmental Protection Agency, Office of Water, *Lead in School Drinking Water* at 1 (EPA 570/9-89-001, Jan. 1989) (Guidance Document). In April 1989, EPA published in the *Federal Register* for comment a proposed list of drinking water coolers that are not lead free, and also noted the availability of its Guidance Document. See 54 Fed. Reg. 14,316, 14,320. In January 1990, EPA issued a final list of water coolers that are not lead free, and also proposed additional coolers for listing. 55 Fed. Reg. 1772. In February 1990, EPA issued a Fact Sheet that listed non-lead-free water coolers by brand and model number. The February 1990 Fact Sheet list contained all the cooler models listed in the January 1990 *Federal Register* notice, and also seven additional water cooler models that had been on the April 1989 proposed list. See Gov't C.A. Exh. 1.

3. In April 1989, the Governor of Louisiana appointed a task force to develop guidance for the State's implementation of LCCA. The Louisiana Office of Public Health, the lead agency designated for implementation of the state plan, was to distribute information and inventory forms to all private and public day care centers and schools; to develop a working group to assist the schools in lead contamination detection; to provide training of day care and school personnel; to arrange for collection of water samples; to conduct monitoring based on the results to ques-

tionnaires; and to discuss or arrange for removal of sources of lead contamination. Gov't C.A. Exh. 2, at 4. The State originally anticipated that all testing could be accomplished within the time set by LCCA. *Id.* at 5-7.[1] Nonetheless, by September 1993, the State reported that only 28% of all schools had been tested for lead contamination in drinking water. Gov't C.A. Exh. 3, at 2.

Louisiana distributed EPA's Guidance Document to schools and day care facilities in June 1989. Gov't C.A. Exh. 2, at 5. It had not, however, distributed any list of non-lead-free water coolers to its schools by February 14, 1993. See Pet. App. A29. On that date, petitioners sent the State a notice of their intent to file a citizen's suit under the Act, as required by 42 U.S.C. 300j-8(b)(1). They maintained that the State had violated LCCA by failing to disseminate the EPA-prepared list of lead-contaminated water coolers, and by "failing to implement a remedial action program consistent with [42 U.S.C.] 300j-24(d)." Gov't C.A. Exh. 4, at 1. On April 5, 1993, following receipt of petitioners' letter, the State sent schools the EPA Fact Sheet listing lead-contaminated water coolers. See Pet. App. A29.

4. On May 4, 1993, petitioners filed suit in district court, alleging that the State had violated LCCA by failing to establish a remedial program to assist schools in remedying lead contamination in water

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[1] The Act provided that all water coolers in schools containing lead contamination were to be removed, repaired, replaced, or rendered inoperative by January 31, 1990. See 42 U.S.C. 300j-24(d)(3).

coolers.[2] Petitioners subsequently amended their complaint to allege that Louisiana had also violated LCCA by failing to distribute EPA's list of water coolers that are not lead free. Petitioners contended that the State should have disseminated the January 1990 list published in the *Federal Register*, not the February 1990 EPA Fact Sheet.

The State moved to dismiss the complaint for lack of jurisdiction or, in the alternative, for summary judgment. The State argued that petitioners' notice of intent to file a citizen's suit was inadequate, and that petitioner ACORN had no standing to sue. The district court denied those dispositive motions on November 15, 1993, concluding that the State had "more than sufficient information to identify the specific requirements allegedly violated," Pet. App. A35, and that ACORN had standing, *id.* at A40. The State then filed a motion for reconsideration of that ruling, in which it contended that, if the provisions of LCCA that ACORN sought to enforce could be the subject of citizen's suits against the State, then LCCA violated the Tenth Amendment. The district court denied reconsideration. See Pet. 12.

On February 24, 1994, Louisiana distributed the January 1990 EPA water cooler list to its schools. On May 16, 1994, the State filed another motion for summary judgment, arguing that petitioners' claim as to distribution of EPA's list was moot. The State also argued that, as to petitioners' remaining claim, the district court had no jurisdiction under the citizen's

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[2] Petitioners' suit was brought against Louisiana state officials acting in their official capacity, not the State itself, but for simplicity we refer to the state respondents in this brief as "the State" or "Louisiana."

suit provision. Petitioners then "decid[ed] that fairly reasonable improvements had finally been made to the LCCA program activities" (see ACORN's Reply to State's Opposition to Motion for Attorney Fees at 5), and, on May 31, 1994, they requested that the State consent to a motion for voluntary dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. After the State refused to consent to a voluntary dismissal, petitioners decided that they would not contest dismissal of the suit. *Ibid.* The district court subsequently dismissed all of petitioners' claims as moot. See Pet. App. A12.

5. Petitioners then filed a motion for attorney's fees. The district court granted that motion, concluding that petitioners were prevailing parties, even though their claims had been dismissed as moot, because petitioners had shown that "their lawsuit was a significant catalyst or a substantial factor" in inducing the State to comply with LCCA. See Pet. App. A24. The district court noted that the State had mailed the EPA Fact Sheet to local schools only after petitioners sent their notice of intent to sue, and that "only after [petitioners] filed the instant suit did the state defendants go to the schools identified in [petitioners'] complaint and assist in the testing of water coolers as required by the LCCA." *Ibid.* The court also noted that only after the lawsuit was filed had the State "discharged [its] duties * * * and sent the required Federal Register list [of non-lead-free water coolers to schools], thereby fulfilling one of the two goals sought by [petitioners]." *Ibid.*

The State appealed the award of attorney's fees. After oral argument, the court of appeals ordered supplemental briefing on the question whether Section 300j-24(d) violates the Tenth Amendment. The

United States then intervened in the court of appeals, pursuant to 28 U.S.C. 2403. In its brief, the United States argued that the court of appeals did not have to reach the constitutionality of Section 300j-24(d), because the fee award could properly have been based on petitioners' separate claim that the State had violated Section 300j-24(c) by failing to disseminate EPA's list on non-lead-free water coolers, and that Section 300j-24(c) is plainly constitutional. See Gov't C.A. Br. 15-35.[3]

6. The court of appeals reversed the fee award. Pet. App. A1-A18. The court first rejected the argument that the fee award could properly have been based on petitioners' claim that the State had violated Section 300j-24(c). The court assumed, for purposes of deciding the case, that the States were required by that Section to disseminate the list of non-lead-free water coolers published by EPA in the *Federal Register*. It concluded, however, that Louisiana had complied with that requirement even before this lawsuit was filed, because the EPA Fact Sheet disseminated by Louisiana before the lawsuit included all the models also listed in EPA's *Federal Register* notice. Therefore, the court concluded, petitioners had failed to show that the State had violated Section

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[3] The United States also argued that the constitutionality of Section 300j-24(d) was not properly presented, because ACORN had not properly alleged a violation of that provision. The United States noted that "ACORN's complaint does not allege that the state has not *developed* a program" required under Section 300j-24(d) to assist schools in remedying lead contamination from water coolers, but rather "it is 'the implementation of the program that failed to pass muster * * *' that concerns ACORN." Gov't C.A. Br. 37. The court of appeals did not address that argument.

300j-24(c), and were not entitled to attorney's fees based on that claim. See Pet. App. A10-A11.

The court of appeals then addressed petitioners' claim based on the State's alleged violation of Section 300j-24(d), and ruled that that provision contravenes the Tenth Amendment, as applied by this Court in *New York* v. *United States*, 505 U.S. 144 (1992). Pet. App. A11-A17. The court concluded that "LCCA gives the States no alternative but to enact the federal regulatory plan as prescribed in § 300j-24(d), and such Congressional conscription of state legislative functions is clearly prohibited under *New York*'s interpretation of the limits imposed upon Congress by the Tenth Amendment." *Id.* at A16. "Section 300j-24(d)," the court stated, "is an attempt by Congress to force States to regulate according to Congressional direction. As the *New York* Court explained, the Constitution does not permit Congress to so control the States' legislative processes." *Id.* at A17. Accordingly, because petitioners had failed to establish that the State was in violation of "any lawful requirement of the LCCA at the time [they] commenced this suit," the court ruled that the award of attorney's fees was improper. *Id.* at A18.

ARGUMENT

The court of appeals concluded in this case that 42 U.S.C. 300j-24(d) violates the Tenth Amendment, as applied by this Court in *New York* v. *United States*, 505 U.S. 144 (1992), because it coerces the States into "regulating according to Congressional instruction." Pet. App. A16. The court concluded that "such Congressional conscription of state legislative functions is clearly prohibited under *New York*'s interpreta-

tion of the limits imposed upon Congress by the Tenth Amendment." *Ibid.*

Ordinarily, a decision of a court of appeals holding invalid an Act of Congress would warrant review by this Court. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). This case, however, presents unusual circumstances, for the decision below has no further practical consequences for the federal effort to address lead contamination in schools. The statutory deadline for States to establish programs under LCCA to assist local schools in remedying the problem of lead contamination in water coolers, July 1989, has passed, and every State, including Louisiana, now has in place such a program (even though some States may have missed the statutory deadline). Moreover, whereas the States may have been under a congressional mandate in LCCA to establish programs to assist local schools to remove lead contamination from water coolers, participation in such programs by the local schools themselves is voluntary and is not compelled by LCCA. See Pet. 7 (acknowledging that point).

Accordingly, EPA believes that the States have now done as much as the agency expected them to do under LCCA to address lead contamination in schools. For that reason, the decision below has no impact on an ongoing federal program, and review by this Court is not necessary.[4]

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[4] No other court of appeals has addressed the constitutionality of Section 300j-24(d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ACORN, *et al.*,

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EDWIN EDWARDS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Movant Public Citizen hereby seeks leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari. The Petition seeks review of a decision of the Court of Appeals for the Fifth Circuit. That court struck down as unconstitutional a section of the Lead Contamination Control Act of 1988, 42 U.S.C. § 300j-24(d), even though the case had been settled as moot and the only issue on appeal was an award of attorneys' fees to petitioner. Copies of petitioners' and the United States' written consent have been lodged with the Clerk. Attorney for the respondent has informed the undersigned counsel of record that he does not consent to the filing of a brief *amicus curiae*.

Public Citizen is a non-profit, consumer advocacy organization with nearly 100,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the

enforcement of a wide-range of health and safety, environmental, and other consumer legislation. Public Citizen has also represented named parties and *amici* in litigation over federal fee-shifting statutes in environmental and other cases. *See Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Foundation v. United States Dep't of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993), *cert. denied*, 115 S. Ct. 315 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). In doing so, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens, who otherwise could not afford competent counsel, to enforce the substantive mandates of federal law.

While petitioners have presented the question whether the court of appeals erred in holding that the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300j-24(c) & (d), amending the Safe Drinking Water Act (SDWA), is constitutional under the Tenth Amendment, *amicus* Public Citizen does not believe that the Court need or even should reach the constitutional question presented. Rather a writ of certiorari should be granted because it was improper for the court of appeals to decide the constitutionality of a federal statute in reviewing an award of attorneys' fees in a case in which the merits become moot. The United States is unlikely to urge the Court to adopt the position advanced by *amicus* Public Citizen because of the United States' institutional interest as a defendant in attorneys' fee litigation. We ask therefore that Public Citizen be granted leave to file the accompanying brief *amicus curiae* in support of granting a writ of certiorari upon the question presented by the attached brief.

Respectfully submitted,
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October 2, 1996

QUESTION PRESENTED

Amicus Public Citizen believes that certiorari should be granted only on the following question:

In deciding whether to award statutory attorneys' fees in a settled case, must a federal court first decide that plaintiffs would have prevailed on the merits, especially where the merits include ruling on an affirmative defense that the statute on which the claim was based is unconstitutional?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS*

The interest of *amicus* Public Citizen is set out in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

A. Proceedings in the District Court

This case has its origins in the ongoing efforts of a public interest organization, petitioner Association of Community Organizations for Reform Now (ACORN), on behalf of the citizens of Louisiana, and a group of concerned parents, to force the State of Louisiana to comply with the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300j-24(c) & (d), amending the Safe Drinking

Water Act (SDWA). The LCCA requires, *inter alia*, state officials to distribute to Louisiana schools a list of lead-lined water coolers published by EPA in the Federal Register and to assist local educational agencies, schools, and day care centers in remedying lead contamination in their drinking water systems. The procedural history of the case is set forth in detail in the Petition for a Writ of Certiorari at pages 11-13. For the purposes of this brief, only a few facts are significant.

First, there was no adjudication of the merits because the parties reached an agreement to dismiss the case as moot. After the complaint was filed, Louisiana had made reasonable improvements in its implementation of the LCCA, and petitioners wished to concentrate on monitoring the State's implementation of its lead remediation program rather than on litigation. Therefore, the district court did not decide either party's summary judgment motion on the merits, but instead granted a consent motion to dismiss on grounds of mootness which explicitly reserved the parties' rights to seek attorneys' fees.

Second, respondents opposed petitioners' petition for an award of fees and costs on numerous grounds, but the district court found for petitioners. Reasoning that "[a] plaintiff may be a prevailing party in the absence of a judicial determination on the merits," the district court made specific findings in support of its conclusion that the lawsuit had catalyzed respondents to comply substantially with the LCCA and awarded petitioners their requested fees and costs. Petition at A-22-A-26. In its fee award opinion, the district court reiterated that petitioners' claims on the merits had been mooted by respondents' compliance with the LCCA. *Id.* at A-21.

B. Proceedings in the Court of Appeals

Respondents appealed the award of attorneys' fees, raising numerous allegations of error. *Id.* at A-8. While explicitly acknowledging that the case had been dismissed as

moot, A-7, the court of appeals announced that, to receive an award of attorneys' fees, plaintiffs must demonstrate that "they had alleged a violation of a lawful requirement of the Act." *Id.* at A-18.

Noting that respondents had challenged the LCCA as violative of the Tenth Amendment, the court of appeals considered each provision in turn. The first provision, 42 U.S.C. § 300j-24(c), requires that states distribute a list of lead-lined water coolers prepared by EPA to schools. Accepting respondents' representation that its distribution of a list prior to the filing of the complaint complied with LCCA--a hotly-contested and unresolved issue in the district court--the court of appeals found that there was no valid allegation of a violation of section 300j-24(c) at the time petitioners instituted the lawsuit, and therefore that petitioners were not entitled to fees incurred for pursuing a section 300j-24(c) claim. *Id.* at A-11.

The second provision, 42 U.S.C. § 300j-24(d), led the court of appeals to engage in a more searching inquiry on the statute's constitutionality. Section 300j-24(d) requires the states to develop plans to remedy lead contamination in school drinking water systems. During oral argument on the fee award, the court of appeals asked the parties to submit post-argument memoranda on whether this statutory provision violates the Tenth Amendment, and it permitted the United States to intervene. *Id.* at A-12.

Subsequently, the courts of appeals issued a decision striking down section 300j-24(d) as violative of the Tenth Amendment. *Id.* at A-17. In light of that ruling, the court held that petitioners were not entitled to fees because they had failed to allege that respondents were in violation of any "lawful requirement" of LCCA at the time of filing suit and dismissed petitioners' claims. *Id.* at A-18.

REASONS FOR GRANTING THE WRIT

Despite the fact that the parties had agreed to dismiss this case as moot, and the fact that an appeal had been taken only from the award of attorneys' fees, the court of appeals held that a court may not award attorneys' fees unless the plaintiff can prove a violation of a lawful statutory requirement. Moreover, the court went even further, striking down a major federal environmental and public health statute as unconstitutional, even though the parties had explicitly abandoned their right to litigate that question.

This decision—to reach out and decide the merits of a moot case, and to strike down a federal statute as unconstitutional in the process—warrants review by the Court because it creates a conflict with decisions of this Court and other courts of appeals over the proper standards for awarding statutory attorneys' fees. Furthermore, by virtually mandating the issuance of advisory opinions on sensitive constitutional issues, the decision creates an irreconcilable conflict with the express direction of this Court that the federal courts should avoid deciding constitutional issues unless necessary.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS OVER THE PROPER STANDARD FOR AN AWARD OF ATTORNEYS' FEES.

By holding that petitioners had to prove that respondents were in violation of a lawful requirement of the LCCA, the court of appeals has, in effect, required petitioners to prove their case at the fee award stage, even though the merits have been fully resolved and the underlying controversy is now moot. Review should be granted because the Fifth Circuit's approach is at odds with

the decisions of this Court and the lower federal courts under environmental and other fee-shifting statutes.

Awards of attorneys' fees and costs under citizen suit provisions in environmental statutes are governed by substantially the same standards developed under other fee-shifting statutes, including the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. *See Pennsylvania v. Delaware Valley Citizens Counsel*, 478 U.S. 546, 560 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983) (listing federal environmental and public health statutes with statutory fee provisions). In order to receive a fee award, a plaintiff need not show that it would have prevailed on the merits of a case that settles prior to final adjudication. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). Rather it must show that it has achieved "some degree of success on the merits." *Ruckelshaus*, 463 U.S. at 694.

In *Maher*, the Court affirmed a fee award under 42 U.S.C. § 1988 to plaintiffs who had obtained a consent decree, despite defendant's argument that fees could not be awarded where no formal judicial relief on the merits had been entered. 448 U.S. at 129. The complaint in *Maher* had alleged federal claims on which the lower courts had not passed, but this Court simply observed that they were "sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, [415 U.S. 528 (1974)]." *Id.* at 131. The Court deemed important that the federal claims "remained in the case until the entire dispute was settled . . . ." *Id.* As Justice Powell declared in his concurring opinion, because the federal claims were "substantial" under *Hagens*, the Court had "no occasion to look behind the settlement agreement to evaluate further the constitutional cause of action." *Id.* at 134.

The environmental fee-shifting cases follow this approach. *See, e.g., Environmental Defense Fund v. Reilly*, 1 F.3d 1254, 1257-58 (D.C. Cir. 1993) (RCRA); *Sierra Club v. EPA*, 769 F.2d 796, 799-802 (D.C. Cir. 1985) (Clean Air Act). A plaintiff may be a prevailing party in the

absence of a judicial determination on the merits. *See, e.g.*, *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993). To receive a fee award, a plaintiff must demonstrate that it was a "prevailing party," by obtaining at least partial success on the merits, whether through full adjudication or by otherwise achieving the relief sought. *See Ruckelshaus*, 463 U.S. at 694; *see also Colorado Environmental Coalition v. Romer*, 796 F. Supp. 457, 459 (D. Colo. 1992) (awarding attorneys' fees to environmental group as prevailing party in efforts to compel state to comply with the LCCA).

A plaintiff prevails if the relief obtained alters the defendant's behavior in a way directly benefitting the plaintiff. *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992). While a plaintiff is not entitled to fees if it obtained only a technical or insignificant victory, *see id.* at 574, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teacher's Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989) (awarding attorneys' fees to teacher's union that had succeeded on "significant issue" of litigation and rejecting test from Fifth and Eleventh Circuits that required success on the "central issue"); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

If a party is deemed prevailing, courts generally apply the two-step approach first established in *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), to determine whether a plaintiff, who has gained some of the relief sought, without obtaining a ruling on the merits, should be awarded fees. *First*, the plaintiff must show that the suit was *a* causal factor in obtaining the relief. *Id.*; *see Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987). Here, the district court found, as a matter of fact, that petitioners had substantially prevailed because their suit caused respondents to improve their compliance with the LCCA. *Second*, plaintiff must show that the legal premise of the suit was not frivolous,

unreasonable, or groundless, *Nadeau*, 581 F.2d at 281 (citing *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)), but no further showing of the ultimate merits of the suit is required. *Id.*[1] Here, the district court found that the lawsuit was necessary to catalyze respondents' compliance with the LCCA, and the court of appeals never intimated that this case was frivolous.

The *Nadeau* standard has been followed in almost every circuit in cases interpreting a variety of federal fee-shifting statutes under which reasonable attorneys' fees may be awarded. The Fifth Circuit had previously adopted a variant of the *Nadeau* test, but the difference was not great. Under that approach, plaintiffs had to show that the goals of the lawsuit were achieved, that the suit caused the defendant to remedy the alleged harm, and that the lawsuit was a "substantial factor" or "significant catalyst" in motivating the defendants to end their illegal behavior. *See Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993); *Associated Builders & Contractors of La. Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 478 (5th Cir. 1990); *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982).

Despite the binding precedent from this Court and Fifth Circuit law directly governing statutory fee awards, the

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[1] *See, e.g., Collins v. Romer*, 962 F.2d 1508, 1514 (10th Cir. 1992) (not "frivolous or groundless"); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990) (not "frivolous, unreasonable or groundless"); *Sablan v. Dep't of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988) (same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983) ("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982) (not "patently frivolous"); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981) (not "frivolous, unreasonable or groundless"); *Staten v. Housing Auth. of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980) ("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (not "frivolous, unreasonable or groundless").

decision in this case radically departs from the developed body of attorneys' fee law and mandates that lower federal courts decide the merits of the case at the fee petition stage. By instructing that a court pass on the merits of a plaintiff's claims even though the case had been dismissed as moot, the Fifth Circuit's approach follows that in the Tenth and the Eleventh Circuits which require a showing that the defendant's actions are legally required before fees may be awarded. *See Dunn v. Florida Bar*, 889 F.2d 1010, 1015 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990); *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986). As a result, those courts have rendered lengthy advisory opinions on significant issues of constitutional law in the context of deciding fee petitions. *See, e.g.*, *Foremaster v. City of St. George*, 882 F.2d 1485, 1488-89 (10th Cir. 1989) (Establishment Clause inquiry), *cert. denied*, 495 U.S. 910 (1990); *Luethje v. Peavine School Dist. of Adair County*, 872 F.2d 352, 354-56 (10th Cir. 1989) (detailed First Amendment inquiry). Therefore, there is a split in the circuits between courts, like the Fifth, Tenth and Eleventh, which require plaintiffs to "relitigate" and win their claims at the fee stage, and the other courts of appeals which require only a showing that plaintiff has substantially prevailed and was a catalyst.

The Court has never allowed a decision on a fee petition to turn into an adjudication of the merits even in situations in which Congress has indicated that courts should conduct some review of the merits of a defense before a fee award. Even where there is no fee-shifting statute, prevailing parties in environmental litigation against the government may obtain fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. *See, e.g.*, *Herren v. City of Jamestown, Kentucky*, 39 F.3d 628, 630-32 (6th Cir. 1994); *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993); *Roanoke River Basin v. Hudson*, 991 F.2d 132, 138-39 (4th Cir.), *cert. denied*, 114 S. Ct. 182 (1993). Under the EAJA, fees may be denied if the government can

show that its position on the merits was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). Yet even with this statutory directive, this Court has cautioned courts against deciding the merits during a fee dispute in a way that "effectively establish[es] circuit law in a most peculiar, second-handed fashion." *Pierce v. Underwood*, 487 U.S. 552, 561 (1988).

Review should also be granted because the decision of the court of appeals will make it very difficult to settle disputes under environmental and public health statutes. Resolution of citizen suits short of a ruling on the merits allows the parties to avoid the costs and uncertainties associated with complex litigation. A system in which a plaintiff's successful settlement of a citizen suit is followed by examination of the merits of their underlying claim as part of a fee application, would render meaningless Justice Powell's admonition that a "request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437; *see also Long v. Bonnes*, 455 U.S. 961, 966 n.3 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari) (test for determining right to fees "does not require a finding that the petitioners would have prevailed on the merits, nor does it require the trial court to hold the very trial which the settlement was intended to avoid").

The decision of the court of appeals will undermine the longstanding, and increasingly important, public policy favoring settlement and other forms of extra-judicial dispute resolution. *See, e.g.*, *Marek v. Chesney*, 473 U.S. 1, 5, 10-11 (1985); Fed. R. Civ. P. 68; Fed. R. Civ. P. 16(a)(5), (c)(7). Not only will the court of appeals' decision reduce the likelihood of settlement on the merits, but it will give defendants another reason to refuse to settle fee disputes, that is, they can challenge the merits even in a moot case, as respondents did here.

Moreover, the decision removes the incentive to settle to avoid the setting of precedent where the parties are not

confident about the likely outcome. This incentive is particularly important in public law litigation where the merits of the case are likely to have far-reaching consequences. Avoidance of the resolution of controversial issues by the courts, and particularly sensitive constitutional issues, is made much more difficult if the merits are thrust upon the plaintiffs at the fee stage.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH EXPRESS INSTRUCTIONS OF THIS COURT TO AVOID DECIDING CONSTITUTIONAL QUESTIONS UNLESS NECESSARY.

Beyond this split in authority, what is most distressing about the decision of the court of appeals is the potential for damage to the bedrock constitutional principle enshrined in Article III, Section 2, that federal courts sit to decide "cases" or "controversies." While, of course, petitioners' right to fees was, and is, a live controversy, the merits of the instant case were not.

Nevertheless, the court of appeals issued an advisory opinion and, in perhaps the most disturbing aspect of the case, struck down as unconstitutional an important section of a federal statute. By rendering a major constitutional decision in a case in which the merits had been mooted, the court of appeals violated this Court's oft repeated and unequivocal command to avoid reaching constitutional questions unless it is necessary to decide them *See Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445-46 (1988); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 157-58 (1984); *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979) *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring.) The court of appeals appeared to recognize that it should avoid reaching constitutional issues

if possible. Petition at A-8 (citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1977)). Nonetheless, by ignoring the substantial body of case law governing statutory fee awards in settled cases, and instead requiring petitioners to prove that they had relied on a constitutional and winnable legal theory, the court established a legal test which virtually requires the issuance of advisory opinions on sensitive constitutional questions.

The court of appeals' foray into the constitutional merits of a statutory provision in a mooted case requires this Court's attention for all of the reasons that Article III prohibits the issuance of advisory opinions and proscribes limits upon the federal judicial role. This bright-line rule against advisory opinions serves the commendable policies of maintaining a proper separation of powers, conserving judicial resources, and ensuring that cases are presented to the Court in terms of specific disputes and not hypothetical legal questions. *See Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

When this case reached the court of appeals, the merits of the original controversy were moot. Two markers of justiciability were lacking: there was no actual dispute between adverse litigants on the issue upon which the court ruled, and there was no likelihood that a court decision in favor of the petitioners would bring about any change or effect regarding respondents' underlying conduct. The only live controversy remaining in the case was whether petitioners were entitled to a fee award. On that question, the parties were unquestionably adverse. However, the relevant question for the fee award, whether petitioners were prevailing parties, was not the question on which the court of appeals rendered its decision. And on that question--the constitutional validity of the LCCA--there was no actual controversy.

Moreover, the court of appeal's decision will not change the parties' behavior in any material way. Respondents have already completed the relevant acts

proscribed by the LCCA by distributing a list of lead-lined water coolers to schools and implementing a plan to assist schools in remediating lead in their drinking water. Whether respondents did so because of the lawsuit or independently is relevant for purposes of the fee award. But the controversy over fees did not create a live controversy over the constitutional validity of the LCCA. It was improper for the court of appeals to use the fee dispute as an opportunity to examine respondents' affirmative defense.

All in all, the court of appeals' decision requires lower federal courts to entangle themselves unnecessarily in constitutional questions even where the merits of the case are no longer justiciable. *See United States v. Freuhauf*, 305 U.S. 146, 157 (1961). This holding violates fundamental tenets of constitutional jurisprudence developed by this Court over many years and should not be allowed to stand.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted and the Court should require that the parties brief the Question Presented by this brief.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,

Petitioners,

v.

EDWIN EDWARDS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, EDWIN EDWARDS, ET AL.

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BRIEF IN OPPOSITION

Edwin Edwards, in his official capacity as Governor of the State of Louisiana, J. Christopher Pilley, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and T. Jay Ray, in his official capacity as Administrator of the Safe Drinking Water Program,[1] respectfully represent:

STATEMENT OF THE CASE

Petitioners herein seek review by this Court of a decision by the United States Court of Appeals for the Fifth Circuit which reversed a decision by the United States District Court for the Eastern District of Louisiana awarding attorney's fees to petitioners in a "citizen's suit" brought pursuant to the Lead Contamination Control Act of 1988 ("LCCA"), 42 U.S.C. § 300j-21 *et seq.* In reversing the award of attorney's fees, the Fifth Circuit held that respondents ("Louisiana" or "State") were not in violation of any lawful requirement of the LCCA when suit was filed, hence the District Court's award of attorney's fees was improper. *ACORN v. Edwards,* 81 F.3d 1387, 1395 (5th Cir. 1996). This decision was based upon two findings: (1) Louisiana had complied with the provisions of 42 U.S.C. § 300j-24(c) at the time this litigation was commenced and (2) 42 U.S.C. § 300j-24(d) was violative of

[1] Since the filing of suit, Mike Foster has become the Governor of the State of Louisiana, Bobby Jindal has become the Secretary of the Louisiana Department of Health and Hospitals and Lovis Wales has become the Administrator of the Safe Drinking Water Program.

the Tenth Amendment of the United States Constitution as falling squarely within the holding of *New York v. United States*, 505 U.S. 144 (1992).

This decision by the Fifth Circuit conforms completely with prior decisions by this Court and is not in conflict with any decision of any other Court of Appeals. Hence, it does not warrant review by this Court.

A. STATEMENT OF FACTS

In 1988, Congress enacted the Lead Contamination Control Act as an amendment to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f, *et seq.*, to address concerns that children were being exposed to lead in drinking water at school. Though Congress commanded action by both the United States Environmental Protection Agency ("EPA") and the States, Congress placed the most substantial obligations upon the States.

EPA's obligations under the statute are minimal. Congress instructed EPA to publish a guidance document and testing protocol designed to assist schools in determining the source and degree of lead contamination in drinking water systems. 42 U.S.C. § 300j-24(b). Additionally, 42 U.S.C. § 300j-23(a) required EPA to publish a list of brands and models of drinking water coolers which were not lead free. Congress directed EPA to distribute the guidance document and list to the States. 42 U.S.C. § 300j-24(a)-(b).

Congress put a much greater burden on the States. It commanded the States to disseminate the guidance document and testing protocol and the list of non-lead-free

water coolers to local educational agencies, private non-profit elementary or secondary schools and day care centers (collectively, "LEA's"). 42 U.S.C. § 300j-24(c). Moreover, Congress mandated, without providing any alternative, that each State establish an extensive and costly regulatory program to provide for the removal of lead contaminants from school drinking water systems. 42 U.S.C. § 300j-24(d)(1) and (3). Notwithstanding 42 U.S.C. § 300j-25(c), which authorized the appropriation of funding in the amount of $30,000,000 for each fiscal year from 1989 to 1991 to be used by EPA to "make grants to states to establish and carry out state programs under section 300j-25(a)", Congress never appropriated any funds for those purposes. Even though federal funds were never provided, Louisiana and other states nonetheless established the federally mandated programs.

Pursuant to its LCCA obligations,[2] EPA prepared its Guidance Document and Testing Protocol ("Guidance Document") in January 1989 and published a "notice of availability" regarding the Guidance Document in the *Federal Register* on April 10, 1989. 54 Fed. Reg. 14,320 (April 10, 1989). EPA also published a proposed list of non-lead-free drinking water coolers on that same day. 54 Fed. Reg. 14,316 (April 10, 1989). The final list of non-lead-free water coolers was not published until January 18, 1990, 55 Fed. Reg. 1,772 (the "final list") – 13 days

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[2] As usual, Congress imposed hopelessly optimistic deadlines upon EPA for issuing guidance documents and protocols and final lists and impossible deadlines upon the States for establishment and implementation of the federally required, but State conducted remedial programs.

prior to the deadline for the States to have completed implementing the program – and a copy was not provided to Louisiana until it was sent by letter dated February 14, 1990. In February 1990 EPA also issued a "Fact Sheet" which included a complete list of the water coolers designated as non-lead-free in the final list published in the *Federal Register*, plus seven additional water coolers which had been on the initially proposed list.

Louisiana attempted to comply with the federal mandate by establishing its LCCA Program in 1989, long before this suit was filed. It published a document entitled "Louisiana's Implementation of the Federal Lead Contamination Control Act of 1988" on November 1, 1989 and distributed it to the LEA's. Louisiana's LCCA Program included State funding of the testing of drinking water sources at schools, distribution of information and questionnaires, establishment of a working group to assist schools in lead contamination detection, training of day care and school personnel, drinking water quality monitoring, and opportunity for LEA's to discuss or arrange for removal of sources of lead contamination.

Louisiana also disseminated the EPA Fact Sheet prior to filing of this suit. The EPA Fact Sheet contained the brand names and model numbers of all of the non-lead-free water coolers listed in EPA's final list. Subsequent to the filing of this suit, even though Louisiana had previously distributed the entirety of the relevant, required information regarding non-lead-free water coolers, it nonetheless distributed an exact duplicate of the final list.

B. PROCEDURAL HISTORY OF THIS CASE

The Association of Community Organizations for Reform Now ("ACORN") sent a notice of intent to file a citizen's suit ostensibly as required by 42 U.S.C. § 300j-8(b)(2), which was received by the State on February 14, 1993. Prior to the filing of suit, on or about April 5, 1993, the State distributed to the LEA's the EPA Fact Sheet which contained all the information required by 42 U.S.C. § 300j-24(c).[3] Shortly after, ACORN sued several State officials in their official capacities asserting only that the State had failed to establish a remedial action program under 42 U.S.C. § 300j-24(d).[4] Later, ACORN

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[3] (c) Dissemination to schools, etc.

Each State shall provide for the dissemination to local educational agencies, private nonprofit elementary or secondary schools and to day care centers of the guidance document and testing protocol published under subsection (b) of this section, together with the list of drinking water coolers published under section 300j-23(a) of this title.

42 U.S.C. § 300j-24(c).

[4] (d) Remedial action program

(1) Testing and remedying lead contamination

Within 9 months after October 31, 1988, each State shall establish a program, consistent with this section, to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

* * *

amended its complaint alleging a violation of 42 U.S.C. § 300j-24(c), arguing that Louisiana's distribution of the EPA Fact Sheet did not comport with 42 U.S.C. § 300j-24(c) because it had not been "published" in the *Federal Register* or, in other words, it was not an exact duplicate of the *Federal Register* final list.

The State moved for dismissal based on lack of subject matter jurisdiction or, in the alternative, for summary judgment alleging that the notice of intent to sue was inadequate and the plaintiff had no standing. The District Court denied these motions. The State then moved for reconsideration arguing that if the alleged violations of LCCA could be the basis for a citizen's suit, then the LCCA violated the Tenth and Eleventh Amendments to the United States Constitution. This motion was also denied.

Following dismissal by the District Court of all its claims as moot, ACORN filed a motion for attorney's fees

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(3) Coolers

In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure that within 15 months after October 31, 1988, all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found (within the limits of testing accuracy) not to contribute lead to drinking water.

42 U.S.C. § 300j-24(d)(1) and (3).

which the District Court granted, finding that ACORN had shown that "their lawsuit was a significant catalyst or substantial factor" in inducing Louisiana to comply with the LCCA.

The State appealed the award of attorney's fees. On appeal, and at oral argument, the Court of Appeals for the Fifth Circuit requested supplemental briefing on the constitutional issues raised by the State. In the decision below, the Court of Appeals reversed the award of attorney's fees, holding that there was no violation of a lawful statutory provision at the time the citizen's suit was filed; therefore, ACORN was not entitled to an award of attorney's fees.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

The Fifth Circuit's decision was factually correct and well reasoned. This Court should not waste its resources on a case which does not present any compelling reasons for review. That portion of the decision of the Court of Appeals finding that the award of attorney's fees could not be based upon the alleged violation of 42 U.S.C. § 300j-24(c) – the alleged failure to send out the final list – was a factual finding supported by the record and does not warrant review. The holding that 42 U.S.C. § 300j-24(d) was unconstitutional is completely in keeping with the current jurisprudence of this Court, *New York v. United States*, 505 U.S. 144 (1992). No Court of Appeals has rendered a decision in conflict with any component of the Fifth Circuit's decision.

ARGUMENT

I. This case does not raise special and important issues for review because the Fifth Circuit correctly held that the State had not violated any lawful requirement of the LCCA, and, therefore, the award of attorney's fees was unwarranted.

A. Louisiana had complied with the requirement of 42 U.S.C. § 300j-24(c) of the LCCA by distributing the EPA Fact Sheet which contained all of the information specified in the statute.

In reversing the District Court's decision, the Fifth Circuit concluded that distribution of the EPA Guidance Document and the EPA Fact Sheet constituted compliance with 42 U.S.C. § 300j-24(c) which directs states to disseminate the Guidance Document and the EPA list of non-lead-free drinking water coolers to the LEA's. *ACORN v. Edwards*, 81 F.3d 1387, 1392 (5th Cir. 1996).[5] Though the State did not disseminate an exact duplicate of the actual *Federal Register* notice, it did distribute the information required by the statute. The Court of Appeals found this to be at most a technicality that was "inconsequential, in that the entities receiving the Fact Sheet were encouraged to be more, rather than less, cautious in determining

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[5] The EPA Fact Sheet contained all of the brands and models listed in EPA's final list published in the *Federal Register* and seven others. *ACORN v. Edwards*, 81 F.3d 1387, 1391 n.9. Moreover, the EPA Fact Sheet directed persons seeking additional information to the *Federal Register*. *ACORN v. Edwards*, 81 F.3d 1387, 1392 n.11. Any additional information contained in the *Federal Register* notice was not information required to be included in the list of non-lead-free drinking water coolers to be distributed by the State.

which drinking water coolers in their possession posed a health risk." *Id.* at 1392. Further "[d]efendants erred in favor of the State's school children, the ultimate beneficiaries of the LCCA, and we see no reason to penalize the State for such an innocuous transgression." *Id.* at 1392.

Therefore, the Fifth Circuit correctly held that defendants had not violated 42 U.S.C. § 300j-24(c).[6] This Court's own rules state that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . " *S.Ct. R. 10.* Surely, the well reasoned factual finding of the Fifth Circuit on this issue does not serve as a compelling reason for review by this Court.

B. 42 U.S.C. § 300j-24(d) was properly held unconstitutional as violative of the Tenth Amendment and thus any alleged failure by Louisiana to comply with such a provision cannot serve as the basis for an award of attorney's fees.

The Fifth Circuit held that 42 U.S.C. § 300j-24(d), which mandated States to establish and implement the LCCA required programs, violated the Tenth Amendment, following this Court's decision in *New York v. United States,* 505 U.S. 144 (1992). *ACORN v. Edwards,* 81 F.3d 1387, 1395 (5th Cir. 1996). In its decision, the Court of Appeals merely applied the law recently enunciated by this Court. Its decision is not in conflict with any decision of this Court or with that of any Court of Appeals on this issue.

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[6] The Court of Appeals did not find 42 U.S.C. § 300j-24(c) unconstitutional as it did not need to reach that issue. *ACORN v. Edwards,* 81 F.3d 1387, 1390-1392 (5th Cir. 1996).

Its holding that 42 U.S.C. § 300j-24(d) was an unconstitutional intrusion upon state sovereignty is completely in keeping with *New York v. United States*, 505 U.S. 144 (1992). The Fifth Circuit properly focused on the pivotal issue of "whether the method of regulation chosen by Congress in § 300j-24(d) impermissibly intrudes upon State sovereignty."[7] *ACORN v. Edwards*, 81 F.3d 1387, 1393 (5th Cir. 1996). Here, as in *New York*, the statute offered no alternative to establishing and implementing this federally mandated program. Louisiana could either establish and fully implement the prescribed program or face enforcement litigation such as that filed by ACORN. This is, in the words of Justice O'Connor, "no choice at all". *New York v. United States*, 505 U.S. 144, 175-176 (1992).

Petitioners convey the impression that 42 U.S.C. § 300j-24(d) imposed only a minimal requirement upon Louisiana. To the contrary, Louisiana was *without any choice at all* whether to establish an extensive and costly program to test for and remedy lead contamination from water coolers *and* other drinking water sources at all schools in the state,[8] to reduce or remediate lead contamination from non-lead-free water coolers, and to "repair, replace, permanently remove or render inoperable" each non-lead-free water cooler prior to January 31, 1990

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[7] Louisiana maintains that Congress can regulate movement of lead contaminated drinking water coolers in interstate commerce, but that it has to effect such regulation upon persons, not states, and consequently, could not, without more, require states to develop complex remedial programs.

[8] There are more than 20,000 water coolers at schools in Louisiana which would have to be tested and possibly replaced, which is certainly no modest or inexpensive undertaking.

unless each cooler was tested and found not to contribute lead to drinking water. 42 U.S.C. § 300j-24(d)(1) and (3). This is not somehow a *minimal* program requiring only insignificant assistance to local educational agencies.[9] Instead, it is a Congressionally imposed requirement "directly compelling [States] to enact and enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *New York v. United States,* 505 U.S. 144, 175-76 (1992). Given the threat of civil enforcement, including the threat of citizen suits pursuant to 42 U.S.C. § 300j-8(a), the State's only choice was to succumb to this federal mandate and regulate according to its instruction.[10] *ACORN v. Edwards,* 81 F.3d 1387, 1394 (5th Cir. 1996).

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[9] The legislative history of 42 U.S.C. § 300j-24(d) is instructive of the "minimal" effort required of the States:

> These programs are to encompass efforts to eliminate all sources to lead contamination in school drinking water, including lead solder and lead pipes in school plumbing, lead service lines, and lead containing water coolers. The Committee also expects such programs to include efforts to secure the water supplier's cooperation in lowering the corrosivity of the drinking water, and therefore its tendency to leak lead.

1988 U.S.C.C.A.N. 3793, 3804 (1988).

[10] In fact, Louisiana took significant actions to protect its school children. In addition to disseminating more than the statutorily required information, it established an elaborate testing and remedial program. Indeed, ACORN's complaint did not allege failure of the State to *establish* a program, but instead questioned its *implementation.*

The Fifth Circuit's decision on this point is wholly consistent with *New York* and the constitutional limitations historically attached to congressional exercise of its interstate commerce power. The critical alternative lacking in the statute is any option to decline to administer the federal program. Absent the option to decline, and given the extensive and costly regulatory program necessary to implement 42 U.S.C. § 300j-24(d), this provision of the LCCA constitutes an unconstitutional intrusion upon state sovereignty. The Fifth Circuit's analysis is sound and in line with this Court's Tenth Amendment jurisprudence. The arguments of the petitioners do not present important or compelling reasons to review this holding of the Fifth Circuit.

II. A citizen suit is not permitted, nor is a plaintiff in such a suit entitled to an award of attorney's fees under 42 U.S.C. § 300j-8(d), when there is no violation of any lawful statutory requirement.

42 U.S.C. § 300j-8(a) provides that "any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any requirement" of the LCCA. 42 U.S.C. § 300j-8(a). The pivotal language is "in violation of any requirement." While 42 U.S.C. § 300j-8(d) permits the award of attorney fees, neither a citizen suit nor attorney's fees are authorized for wholly past violations of a statute. See e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Fdtn.*, 484 U.S. 49, 64 (1987) (holding that a similar citizen suit provision of the Clean Water Act does not permit citizen suits for wholly past violations). As stated by this Court in that case:

> [T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen's suit.

Id. at 60; see also *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (where this Court interpreted a similar 60 day notice period as intended to give "alleged violators" a 60 day non-adversarial period to achieve compliance).

Here, the Fifth Circuit correctly held that Louisiana was not in violation of any lawful requirement of the LCCA at the time suit was filed. *ACORN v. Edwards*, 81 F.3d 1387, 1395 (5th Cir. 1996). Consequently, the citizen's suit provision of the LCCA neither permits such a suit to be prosecuted nor supports an award of attorney's fees. Furthermore, petitioners have cited no case in which a party was awarded attorney's fees for instituting suit under a similar statutory provision when no violation of that statute existed at the time of filing.

CONCLUSION

For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of certiorari should not issue.

Respectfully submitted,

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